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ABSTRACT

Researchers interviewed 33 social scientists, 70 attorneys, and 10 federal district judges to discover their views on the use of expert social science testimony in school desegregation litigation. Selected from 17 desegregation cases adjudicated in federal district courts since 1970, the interviewees were asked about their roles in the litigation; their courtroom experiences and conflicts; preparation for the role; methods of handling opponents; and their perceptions of the impact of expert testimony, key desegregation issues, and the proper function of social science testimony. The findings indicate that most social scientists experienced conflict between the roles of scholar and witness and between their courtroom role and their personal political positions. Attorneys felt no such conflicts and consciously used expert testimony to educate judges about segregation as well as to undermine opponents' arguments. The authors also discuss interviewees' psychological, strategic, and factual preparations for testifying; the characteristics of effective witnesses; cross-examination tactics; the strategies of collaboration, conversion, or coercion that attorneys used to influence judges; the use of witness panels; and the underutilization of social science expertise in implementing desegregation decisions. The study's interview schedules are appended. (Author/RW)

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INTERACTIONS AMONG SCIENTISTS, ATTORNEYS AND JUDGES IN SCHOOL DESEGREGATION LITIGATION

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CHAPTER 1:

THE SOCIAL CONTEXT OF SCHOOL DESEGREGATION[1]

Current efforts to advance school desegregation illustrate both the continuing press for racial change in America and traditional resistance to new racial patterns. Thus, desegregation triggers a variety of feelings, ideas and actions among Americans. Different people and groups have different images of the meaning of national/local programs fostering racial heterogeneity in schools.[2] For some, it represents a violation of fundamental rights, to be avoided by multiple forms of resistance. For others, it is one of several nuisances perpetrated and supported by the federal government, to be obeyed with as little serious commitment and energy as possible. Moreover, some see it as one more way affluent whites maintain control of minority populations, and shut off their efforts at self-governance, control of their own schools, etc. For some, desegregation is an end in itself, and constitutes gaining a right long denied. Others see it as primarily a means to other ends, as a major opportunity for creating minor reforms in the generally positive operation of schools. Still others see it as a way to create fundamental changes in schools, local communities and national socio-political patterns.

The definition of desegregation as a viable school condition or situation also varies considerably. For instance, depending upon who is doing the defining or observing, desegregation can mean, or can be measured by, the following criteria:

number of predominantly black or predominantly white or predominantly Hispanic schools in a unitary district

comparisons of the percent minority enrollment in each school in a system comparisons of the percent minority enrollment in each class or track in a school

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[1] Expanded versions of this chapter appear in Chesler, Crowfoot & Bryant, (1978;1979): and Rothenberg & Chesler (1980). We appreciate permission from Drs. Crowfoot and Bryant and Mr. Rothenberg to print portions of it here.

[2] Distinctions have been drawn between physical desegregation (wherein people come into new forms of contact with one another), cultural desegregation (wherein customs speech and other traditions are shared), and structural desegregation (wherein joint interaction in clubs a[illegible] informal associations occur). With special respect to schools, "desegregation" (indicating physical heterogeneity and mixing) is often distinguished from "integration" (which usually signifies a positive set of educational, cultural and structural interactions among members of different races).

comparisons of percents of majority vs minority students achieving at grade level "norms"

percents of minority and majority students with positive racial attitudes and interactions

percents of minority and/or majority students with positive educational and occupational aspirations

percents of majority and/or minority students participating in student activities such as clubs, athletics, student government and newspapers

percents of students of different races affected by school disciplinary policies (suspensions and expulsions)

The first three criteria simply speak of demographic issues and pupil movement. The latter five criteria assert some standards for effective desegregation processes and outcomes, and begin to spell out the concern for integration, or high quality interracial education.

Various criteria and meanings of desegregation reflect the reality that different communities have implemented quite different desegregation plans. Some have bussed minority youth throughout a system, some have bussed only small numbers of minority youth, some have bussed majority and minority youth; some have reassigned students at all grade levels, other have begun this process only at the 3rd or 5th grade levels; some have done it in one year, others have phased it over several years; some have created many new educational programs, others have reassigned youngsters with few program innovations; some have done it with great community support, others have faced considerable resistance; some have done it only under court order, others have done it more or less voluntarily.[3]

New public policies and programs sometimes have been ineffective because they have not examined fully their underlying assumptions. Conceptual models and assumptions make important differences in topics selected, data gathered, and analyses and interpretations made in social science theory and research. Likewise, the models and assmuptions used by lawyers, school board personnel, judges and applied social scientists (e.g. witnesses and plan writers) make a difference in their efforts to promote (or thwart) school desegregation. Exploring different conceptual frameworks which may be used to order and explain phenomena, or to design and implement programs, is essential if we are to identify and clarify the diverse and confusing causes of school segregation, the acts which will remedy those causes, and ultimately the ends desired from any effort to desegregate schools.

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[3] Several good summaries exist of the variety of techniques used to reassign pupils, and even to address some educational programs related to reassignment plans: Foster (1973); School Desegregation in Metropolitan Areas (1977); Tompkins, (1976).

In the first section of this chapter, we review contrasting paradigms of social thought, as they are represented both in social scientific research and in public practice. We expect to demonstrate important differences in two widely used and fundamentally different ways of thinking about the society, about local communities and organizations, and about schools and school desegregation in particular. Then we examine a variety of components, or specific changes, accompanying the thrust for desegregation. In this manner, we hope to give concrete and specific meaning to an often abstract topic. In a final section, we examine the ways in which different communities have responded to school desegregation controversies and to their eventual escalation to litigation and adjudication.

Alternative Conceptual Models of Social Systems

Throughout the development of the social sciences, two alternative models or paradigms of social systems and systemic functioning have been dominant. One model focuses on order and equilibrium as basic ingredients and virtues in the nature of societies; the other focuses upon the operations and necessity of conflict and change.

Chambliss' (1973) review of several scholars' analyses of these two models provides us with the following descriptions. Essential assumptions underlying the consensus paradigm include:

1. Every social system is well integrated.
2. Every society exists on the consensus of its members.
3. Every society is relatively persisting.
4. The governing bodies of a society are value-neutral and act to promote the common good.
5. Social inequality exists as a result of levels of hard work, talent, and selection by others.

On the other hand, essential assumptions underlying the conflict paradigm include:

1. Every society exists with ubiquitous social conflict.
2. Every society exists with constraint of some members by others.
3. Every society is constantly changing.

4. The governing bodies of a society participate in the struggle on one side or another, and use organs of the state (law) as instruments for their own benefit.
5. Social inequality exists as a result of the use of coercion, fraud and inheritance as the basis for obtaining resources.

These models are ideal types, and as such do not describe actual social situations...they refer to underlying assumptions or theories. Moreover, they are not completely exclusive of one another, but may be considered to exist on a continuum, with potential overlap. A number of social theorists and practitioners have tried to create syntheses which mix elements of both models. For instance, to argue that a consensus exists does not imply that all people agree on all social goals, or on the institutional means to reach them. Obviously, minor differences can exist within a general consensus. As Van Den Berghe states, "while societies do indeed show a tendency toward stability, equilibrium and consensus, they simultaneously generate within themselves the opposites of these" (1963: 696).[4] Similarly, the argument that conflict is ubiquitous does not mean that war is constant; surely moral agreement and common actions are evident on many issues, among many groups, and in many times and places. Thus, it is generally agreed by most who deal with these idea systems that both stability and change, consensus and conflict, are essential and undeniable ingredients of society. As Coser notes in his updated attempt to state the issues clearly: "They, (each) are partial theories sensitizing the student to one or another set of data relevant to a full theoretical explanation" (1970: 9).

Thus, while these two paradigms are not necessarily mutually exclusive interpretations of the world at large, they each do provide very different perspectives for viewing social phenomena. When compared and contrasted with one another, they highlight choices theorists, researchers and educational practitioners, and lawyers and judges must make in their work. Part of our intellectual strategy in this chapter is to discern and/or pose this provocative dialectic, and to move back and forth between polar examples in order to increase our own clarity and to stretch the range of our thinking about theory, research and practice.

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[4] Numerous scholars, of various persuasions, also have stressed the ways conflict may be strategically "functional" or useful for societal stability and improvement (Coser, 1956; Dodson, 1960; Himes, 1966). It may be necessary for surfacing differences, correcting injustice, tuning programs to the real needs of others, and providing a safety valve against future explosions.

The conceptual distinctions arising from these two paradigms have been used not only to describe social systems in general, but policy orientations and social programs on a less macro scale as well (Horton, 1966). They also may be useful in describing differing conceptions of a) communities and organizations, b) schools and schooling in general, c) and school desegregation as an important part of schooling. We will briefly discuss each of these in turn.

Conceptions of Communities and Organiztions

Advocates of a consensus perspective generally argue that there are common or almost-universal values and norms that guide a community. When there is conflict about such norms, the state - usually the courts and the law as an arm of the state - acts as the neutral arbiter of various groups' interests. As Chambliss and Seidman describe this view:

> The State is a vast neutral framework within which struggle and debate and negotiation can take place...while no doubt specific substantive laws reflect the interests of specific groups, the constitutional framework is value-free and represents the interests of the polity (1971: 52).

Advocates of a conflict perspective suggest there is a constant and deep conflict of values and norms. Moreover, they would ask, who is the State, or the polity? Not all people have equal power or equal money, and thus not all have equal access to full participation in the polity nor in the State mechanisms that mediate conflict. Perhaps as individual agents, legal and judicial actors may be relatively neutral, but as an element of the State there is no neutrality in legal and judicial institutions. Not all citizens benefit equally from actions of the arms of the State.

Scholars and practitioners operating on the basis of the consensus model generally assume that most elements of a community can and do work together. Accordingly, they envision overarching values which bind different groups together, permit commonly trusted leaders to emerge, and promote cooperation--especially during crises that may accompany community change. People adhering to consensus or order assumptions agree that conflict occurs in communities and organizations, but prefer to see conflict as an ephemeral, accidental, or temporary circumstance, one that is neither desirable nor useful.

In contrast, academics and practitioners who work with the conflict model assume that all parts of a community do not cooperate--that these groups indeed may have little experience in working together. They observe an unequal distribution of resources and power that results in different groups with divergent values, different trusted leadership, different ways of relating to key issues and institutions--and, consequently, a history of conflict with one another.

Finally, while a consensus model assumes that conflict occurs in spite of existing structural characteristics of organizations, a conflict model assumes that structural characteristics of organizations create conflict. For instance, Dahrendorf locates the primary root of conflict in the authority system present in all organiztions:

> In every social organization some positions are entrusted with a right to exercise control over other positions and to ensure compliance with authority through coercion...The persistence in time of authority structures gives rise to relations of dominance and subordination and thus provides the occasion for exploitation (Quoted in Oberschall, 1973: 33).

Gamson (1968) elaborates this view, distinguishing between two organizational parties -- authorities and partisans. Authorities generally occupy managerial roles, and are responsible for making and implementing policies. Partisans generally occupy lower status positions in organizations, and are ruled by authoritative decisions. As a result of their structural position, partisans are likely to have to challenge managerial authority in order to get what they want. According to Gamson, this dialectic or strain is generic in organizational life...a view consistent with the conflict paradigm.[5]

Alternative Models Applied to Schooling

Schools play crucial roles in the society's efforts to solve the dual problems of conflict and order inherent in societal differentiation and integration They also are key arenas for exacerbating or altering the generational transmission of racial inequality.

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[5] The variety of uses of the term "conflict" requires an important distinction between what often is called "realistic" or "objective" conflict, and "unrational" or "subjective" conflict. The former refers to incompatible goals, task differentiation or disproportionate shares of valued resources; the latter refers to experiential factors such as misperceptions and miscommunications, psychological feelings, etc. (Coser, 1956; Mack and Snyder, 1957; Boulding, 1962; Dahrendorf, 1958; Fink, 1968; Rapaport, 1960; and Williams, 1947) A second distinction can be made between conflict as an organizational "situation" or "condition" and conflict as a personal or group "behavior" or "reaction". The structural characteristics of communities or organizations may represent conflict situations that give rise to certain conflictual social reactions by individuals and groups (reactions such as tension--release, attack and defense, flight, etc). For the most part, our discussion stresses the role of objective conflict, regardless of the levels of subjective experience or awareness individuals bring to these social situations.

Adherents of the conflict paradigm start from assumptions of inequality and contest between interest groups in the society; they see the school as an arena for the maintenance of societal inequality.[6] Struggles occurring in more fundamental social institutions, such as the polity and the economy, dominate the life of the school, and determine the nature and outcomes of conflict within the school. Accordingly, schools are seen to channel students into economic, political and social roles that maintain for some conditions of privilege, for others poverty, and for others vulnerable economic existences somewhere in between. Schools also teach obedience to vague and abstract views of the political system, and passive conformity to rules and regulations established by legitimate authority. Different things happen to men and women, to black and brown and white people, and to rich and poor youngsters in schools; and the educational system uses sexual, racial and economic criteria carefully to sort and screen people into limited opportunities for mobility. Privileged groups of affluent white males exert monocultural control over the symbols, arenas, and norms of social interaction. Other cultural and social styles and preferences are given short shrift, and must contest with these monocultural values for visibility in the school.

Adherents of the consensus paradigm start with the assumption of a normative consensus as the necessary basis of societal order. Schools are seen as institutions that maintain such normative agreement and balance the incremental changes and minor differences that exist in the surrounding social context.[7] Since this paradigm views the American society as valuing open access to positions of leadership and privilege, schools are seen as helping to actualize this democratic and achievement-oriented ethic. Youngsters are aided to overcome the natural inequalities of their origins, and to acquire the basic attitudes and skills required to perform roles congruent with their talent and ability. The variety of pluralistic political beliefs and actions available in the society at large are also manifest in the school, and the school encourages (or at least does not prohibit) inter-status groupings among various races and classes. For the most part, universal standards and procedures guarantee that similar things happen to men and women, black and brown and white youngsters, and rich and poor students in schools. When the outcomes of schooling deviate from these universal criteria and fail to respond to individual attributes, it is seen as due to inadequate administrative practice, maladjustments between the school and other institutions (such as families responsible for prior student preparation), or the talent, effort or attitudes of students who are failing.

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[6] This general view is explicated by a group of revisionist historians and social scientists concerned with education. See for example: Bowles (1972); Carnoy (1972, 1974); Katz (1970); Spring (1976).

[7] This general view is called "meritocratic" by Rehberg and Rosenthal (1978). It is explicated by social scientists such as Goslin (1965); Parsons (1959); Hauser (1971).

One example of the distinctions which flow from these two different models of schooling exists in the explanations given for the growth and expansion of public education in the United States. Squires notes that according to the consensus view, education "expanded in response to the rising technical skill requirements of jobs and to create greater equality, or at least equality of opportunity" (1977: 437). According to the conflict view, education "expanded to meet the rising social control problems generated by industrialization and urbanization in the U.S. by imparting non-cognitive traits of obedience, discipline and respect for authority in students" (Squires, 1977: 437). In this view, elites shaped and enforced a consensus on certain core values, helping to socialize newcomers and marginal people into belief systems consistent with the dominant group's (white Angle Saxon Protestants) values.

In seeking to assess the current validity of these two models of our society and our schools, Squires has identified the basic issue as whether education's value pays off according to merit or technical competence/training, or according to non-job-related social and political skills and status. Adherents of the consensus model hold that historic and pervasive links between family origin and educational attainment, and between educational attainment and occupational status, are the direct result of prior family socialization, technical education training, talent or skill, and changing job requirements. Adherents of the conflict model argue the relevance of group struggles that have placed certain classes (white and affluent) in control of both occupational and educational systems. They control the rules of the game -- the ways in which requirements are developed, as well as the ways they are implemented: preferred educational and occupational opportunity and outcomes (only partly related to actual talent or training) to children of elite groups, and lower status tracks and outcomes for children of poor and minority groups (Collins, 1971).

Inside the school organization, adherents of the consensus model assume authority is wielded as a public trust on behalf of all people. Others, not in power, generally trust the good will of those in managerial and governing roles, believe that authority is rooted in professional expertise and efficiency, and therefore feel that its exercise usually is both legitimate and wise. Consensus theorists and practitioners see no reason to interfere with this exercise of public trust, and dismiss citizen accountability in preference for intra-professional guardianship and systems of peer review and monitoring. This view is most consistent with both bureaucratic (Callahan, 1962; Katz, 1964) and collegial (Corwin, 1970; Miles, 1967) notions of the formal control structure of schools. While these views of schools do not ignore internal and external conflicts, they generally are seen as avoidable, unfortunate, caused largely by subjective reactions, and remediable by better managerial procedures.

Adherents of the conflict model assume authority in the community and the school is wielded by ruling groups primarily in their own interest. That interest includes maintaining the power of ruling groups, perhaps including some rewards that "buy off" challengers and partisan groups with lesser power. Inside the school, authority is wielded by professional educators in the primary interest of professional adult educators. Others, not in power, often do not trust this authority to govern in ways that meet their needs. Therefore, conflict theorists see it as imperative that unrepresented or low power groups find ways to hold educators publicly accountable for their acts. This view is most consistent with clearly politicized notions of the formal control structure of schools (Carnoy, 1974; Fantini, 1969; Kimbrough, 1964; Lurie, 1970).

Alternative Models Applied to School Desegregation

As should be clear from the foregoing brief discussion, the consensus and conflict paradigms offer alternative views of the roots of racial inequality and segregation, the purposes of racial desegregation and the remedies likely to achieve those purposes. As such, each paradigm suggests different problems that must be solved for desegregation to be effective.

According to adherents of the consensus model, for instance, strains have arisen between the value of equal opportunity and the need for competent and talented people in our highly technical economy. Over time, minority subgroups have competed less effectively than whites for these cherished economic roles and for positions of political leadership. Such circumstances have their roots in a history of racial and class stratification, although this history is being altered by more egalitarian social arrangements. Intergroup relations' problems are due primarily to individual prejudice, and occasional systematic deviations from American norms of racial and social equality.

Since schools are seen by consensus theorists as essential to the realization of equal opportunity and achievement, minorities must be provided with school experiences which will enable them to be competitive in the employment market, as well as in attempts to gain political leadership and social privileges. The purpose of school desegregation is to assure that minority youngsters will have access to the same educational resources and experiences as do whites. It is a response to the feeling that minority aspirations may be forever blocked, and provides an arena in which talented minority members may advance themselves.

From the perspective of this paradigm, a good desegregation remedy should work toward improvements in the academic achievement of minorities, while also building a moral and normative consensus in the society. This implies a remedy in which all children are immersed in the dominant culture, and in which minority children are taught in a majority environment. They should experience the pressures and opportunities to assimilate into the dominant culture. Specifically, it justifies the transportation of minority children out of their neighborhood schools into outlying "white" schools, where the students and the values are those of white, middle class America. In addition, since the underlying roots of social inequality are in people, and minimally embedded in other institutions, desegregation can focus on the academic aspects of schooling, safely ignoring other aspects of race relations inside and outside the schools.

Adherents of the conflict model provide some different images of the roots of desegregation. In their view, the American society is experiencing another episode in its continuing struggle between powerful groups who rule the society and minorities who historically have been at the bottom of the socio-economic ladder. Racial oppression is seen to be systematic and coercive, with only limited progress being made toward true equality or justice. Intergroup relations' problems certainly are supported by patterns of individual prejudice, but much more importantly by institutional racism, a basic, original and heavily embedded feature of the American society (Chesler, 1976).

According to the conflict model, desegregation should increase the possibility of justice in the society by increasing the status and power of minorities in their attempt to negotiate for various resources with more powerful white groups.

The maintenance of pluralistic goals for performance, and of distinct cultural heritages, is essential. A potentially dangerous byproduct of desegregation, in this view, is that it might dilute the concentrated power of numbers available to minority communities by spreading their children throughout the broader white community. The result might be a loss of the sense of cultural uniqueness and the power base from which minorities protect and advance their interests. Thus, any remedy should not destroy cultural identity or enforce total minority immersion into overwhelming white institutions as the price of desegregation. Pupil transfers should be two-way, with some majority children coming to minority schools. In addition, since the roots of racial inequality go far beyond individual prejudices and school procedures, desegregation plans must attend to the political-economic and residential aspects of inequality and segregation.

From this perspective, the focus on schools alone diverts attention away from the increasing economic isolation and abandonment of the poor of all races, especially blacks and Hispanics. Local communities should not ignore these patterns of racial separation and stratification, nor assume a consensus on race-related issues and concentrate on the schools' problems. According to adherents of the conflict model, significant and sustained changes cannot be made in schools unless connections are made to problems of municipal finance, jobs, housing, social services, crime, transportation, political representation, federal agency actions, and all the other factors which determine the quality of life in a local community. If the entire politico-economic structure is involved in the maintenance of racism and inequality, then educational changes cannot effectively address these issues without attending to the role and actions of larger social structures. Thus, positive efforts at desegregation also must address broader educational issues, such as how schools are to be financed and controlled. Whether local school financing occurs via local property taxes, general state revenues, or federal block grants matters a great deal. It is relevant to community-wide questions of financial inequality, and places school desegregation conflicts in the context of broader community issues. Similarly, it matters for desegregation how local schools are to be controlled. Community elites who rule in the name of a local consensus establish very different governance patterns than negotiators arranging collaborative bargaining among various conflicting groups.

When we turn from the purposes of school desegregation (i.e. creating a single dominant culture versus empowering minorities), to questions of strategy and tactics, the conflict and consensus models once again point to different programs and policies (see Chin and Benne, 1969; Crowfoot and Chesler, 1974; Rothman, 1970; Paulston, 1976).[8]

The consensus strategy of change makes assumptions congruent with the broader consensus paradigm. It assumes that a relatively rational and collaborative problem-solving process will permit everyone to participate as they wish and to work together to solve organizational or community problems. When and if the process of collaborative problem-solving fails to work effectively, it is assumed this is accidental rather than deliberate or inevitable. Therefore, increased communications should provide better information and broader input to a basically open decision-making effort. Groups who feel their needs and interests are not being met should use tactics of appeal, wherein they communicate their concerns to authorities whom they expect will serve the common good. From such a perspective, the creation and execution of desegregation plans may safely be placed in the hands of the school authorities, who have a special expertise. These individuals can produce a satisfactory result through a process of rational problem-solving, scientific analysis of options, and persuasion.

Adherents of the conflict strategy of change make assumptions congruent with the broader conflict paradigm. As such, the basic process utilized to make changes involves advocacy of group interests and negotiations or collective bargaining. In this situation low power groups must gain power. When various groups have fairly equal power (or at least sufficient power to hurt one another), they will make joint decisions that protect and advance their respective goals and vulnerabilities, as well as protect the system's viability. When this basic process fails to work smoothly, it is assumed one group has managed to gain so much power it can ignore or disregard other groups' needs and interests. More communication may not help in this situation; it might even give away important secrets (about vulnerabilities, potential compromises, etc.) that could be used to increase the power imbalance. Thus, a conflict model sees the creation of desegregation plans as a continuation of basic conflicts. School authorities cannot be trusted to wield power for the common good because their norms are unlikely to be those of minority groups, and because their "expertise" is often irrelevant to the needs of minority groups. Thus they cannot be relied upon to produce desegregation plans which serve all parts of the community equally well. Plan creation should be a process of mobilization of low power groups, pressure and negotiations, and monitoring of authorities' actions.

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[8] As we noted in the general discussion of the conflict and consensus models, our elaboration of the ways these models lead to change strategies should not bind us to an either-or orientation. Conflict and consensus-based strategies can be mixed or used in a serial manner in any change effort such as desegregation. Conflicting and competing community or school groups can make a temporary consensus or coalition on single issues, even while they continue to be in conflict on other issues. By the same token, groups in a consensus may experience tactical disagreements, internal contests for dominance, etc.

Thus far we have spoken of the two paradigms without relating them to parties in desegregation efforts. But as should be clear that in a pluralistic society each paradigm serves different groups' special interests. Who gains from the perception that consensus is the natural order and that conflict is unnatural and/or dysfunctional? By and large, institutional managers and other authorities.[9] Those in control of major social processes need to be able to maintain them against challenge and change. In so doing they also protect their own privileged positions. In a democratic society, where superior force is not a sufficient rationale for rule, such control requires the establishment of an official ideology that defines and justifies their works as "good". Thus, authorities require a societal model that suggests the current order is right and proper, that is it freely and consensually agreed on, and that conflict about it is illegitimate. In school cases the defendant school board and allied professional and civic elites or majority groups are most likely to adopt a consensus view.

Who gains from the perception that conflict is natural or functional? Oppressed groups and those who would benefit from changes in the distribution of societal resources must organize new resources to combat prevailing power structures. If the system is unresponsive to their needs, and appeals do not bring redress, their attempts to heighten conflict and generate threats to the prevailing order also require a supportive ideology. Thus social movement organizers often argue that some people are benefitting unfairly from current arrangements, that things need not be the way they are, and that inequality or oppression is not inevitable. They require an ideology that assumes authorities or the "system" is to blame for various problems, and that escalated conflict and change is both justified and necessary. In school cases, plaintiff minorities are most likely to adopt a conflict perspective.

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[9] Gamson (1968) notes that authorities generally assume a consensus perspective for understanding social and political problems. In contrast, potential partisans generally assume a conflict perspective for their understanding.

In the middle of the conflict over school desegregation stand the federal courts. Most school desegregation has occurred only as a result of lawsuits. What is the position of the federal judiciary with respect to the two models? At one level, the court system would appear to be at the heart of the consensus model. It is an arm of the state. Moreover, the federal judiciary is, by and large, comprised of older, upper-class white males who reflect the dominant culture. The court system itself is founded on an ideology that it is a neutral, value-free framework within which all underlying groups can acquire redress. To choose litigation as a strategy for desegregation is to choose to work within a consensus institution. At another level, however, the legal system is allied with a conflict perspective. A lawsuit concerning segregation permits various parties to attack one another, and may give more bargaining power to a minority than most other actions they might take. As we will see, it allows them to present conflict-oriented views of desegregation and race relations that locate the roots of segregation in the basic arrangements of the society.

Figure 1.1 summarizes the relevance of these two paradigms of social analysis and social change for the process of desegregation. With this in mind, we now turn to a more concrete series of illustrations of desegregation programs in local communities. What might constitute meaningful steps toward high quality interracial education?

Program Options in Local School Desegregation[10]

We have indicated that there are many different visions of school desegregation, and therefore, different versions of what must be done in order to make it a success. All too often, plans and planners focus only on the problems of pupil movement, and not on the social and educational conditions prevailing in local schools. At the very least, desegregation is a complex process of school change, one requiring new analysis and programming at various levels of a school system's operations. In order for schools to support and advance desegregation, change

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[10] The programs suggested in this section are derived from several sources, and each of the following sources contains more elaborate discussions than summarized in this chapter. See: Coulson, et al., (1976); Coulson, et al., (1977); Forehand and Ragosta, (1976); Forehand, Ragosta and Rock, (1976); Weinberg, (1977); Fulfilling the Letter and Spirit of the Law, (1976). We have reviewed 26 of the individual cases studies that went into FLSL, but for the purposes of simplicity, all references are made to the summary report.

Figure 1.1

Alternative Models of School Desegregation Contexts and Issues

Desegregation Characteristics	Consensus Model	Conflict Model
1. General Assumptions		
a) The Problems of Race Relations in School	are rooted in poor communication, inadequate socialization, and the influence of malcontents. are due to prejudice and ignorance on the part of some whites. are outgrowths of natural social processes.	are rooted in differential socialization and status, exploitative white control, and rebellion by minorities. are due to the schools' own organizational inequalities. are outgrowths of racism throughout society.
b) Views of Conflict	may be natural, but is unnecessary, is a nuisance to be avoided, or resolved quickly.	is natural and necessary. is the key resource needed to alter the system.
c) The goals of desegregation	are to assimilate and adapt minorities to white styles. are to improve academic performance of minorities, contribute to peaceful race relations, and improve self-esteem of minorities.	are to empower minorities in the struggle for social justice. are to reduce white racism. are to improve academic performance of minorities, contribute to clarity about the skills in and need for racial change.
2. Community Structures		
a) Power and Control	are shared by the entire community and exercised through democratic processes.	are held by affluent white elites and exercised in relatively covert ways.
b) Elites	are representative and trustworthy. often act altruistically to serve the general welfare. are part of the same community of interest as the grass roots.	exploit others. will resist changes that threaten their self interest. seldom are affected by mass education policies such as desegregation. have goals, interests, and styles different from the grass roots.

Figure 1.1 continued

Desegregation Characteristics	Consensus Model	Conflict Model
2. Community Structures(cont.)		
c) The Schools	are an arena for individual mobility. are a pluralistic reflection of all groups' values.	are an arena for maintaining differential access to societal rewards. are built in the image of affluent groups.
3. Organizational Features of Schools		
a) Authority	is wielded as a public trust for the common good. is trusted by those not in power. is legitimate and handled wisely. is professionally accountable to peers.	is wielded in the interest of ruling groups within and without the school. is viewed as arbitrary-and thus not to be trusted by those not in power. is mysterious in its workings. is accountable to the public.
b) Norms	are the natural outgrowth of shared values and goals like individual achievement. are universal and good, should guide us. Communication resolves differences and increases consensus. Deviants are maladjusted or pathological.	result from the imposition of power and are used to justify power. differ by groups and are part of the contest. Communication often clarifies differences and thus increases conflict. Deviants are disagreers who are labelled deviants and controlled accordingly.
c) Professional-client-consumer relations	Professional expertise is valid. Involving parents and students is good. Control should be in the hands of professionals.	Professional expertise is a mask for elite standards and values. Involving parents and students is good if this is translated into client power to decisions.
4. Change Plans	come from agreements among all parties is supported by top managers. should be a process of rational problem solving, scientific analysis of options and persuasion relatively easy to do, within the current structures of schools.	come from strongly felt needs of excluded and oppressed groups. often implemented without support from managers. should be a process of mobilization of low power groups, coalitions with some elites, and threats and bargaining. hard to do without major systematic change throughout schools.

must occur in the community, in the organization of local schools, in the classroom, and in the individuals who comprise the teaching and learning network. Changes at all these levels are interactive and interdependent with one another. What kinds of changes make the most sense?

All communities are not alike, of course, and the desegregation dynamics of a community and its schools often reflect the geography, demography, and cultural traditions of the particular locale. Communities also differ in the degree of overt conflict that exists between majority and minority groups, and between affluent and poor groups, as well as in the institutional means available for resolving controversies. One general principle that cuts across communities, however, is that it helps if community leaders vigorously support desegregation and related school changes. How to get that support is another question: varied observers suggest appeals to democratic values, use of friendship networks, appeals to self-interest, pressure and threats, etc.[11]

One strategy for achieving community involvement in peaceful desegregation is to create a representative group to engage in broad-based problem-solving activities. People from all racial and class groups may be brought together under a banner of mutually acceptable goals (for example, order, tolerance, and respect for the law). They may be asked to respond to school problems and to develop local programs or policies. The success of such community planning for schools is rooted in the consensus model.

A second community involvement strategy endeavors to organize members of particular interest groups that feel they are excluded or suffering as a result of current progress or lack of progress on desegregation plans and programs. The objectives of this approach are the redress of historic injustice and the building of a potent organization with which to challenge the power of current decision-makers. Group members seek to generate a credible threat to the ability of school authorities to govern the existing system, and thus to require their inclusion in decisionmaking--not merely consultation in planning. Threatened or actual demonstrations, teacher and student strikes, and parent or service group boycotts are all examples of this conflict model in action.

Some communities have generated unique organizational forms for influencing the school desegregation process. For instance, interracial coalitions and local school advisory boards have permitted many newly involved persons to play a role in this change process (Burges, 1978; Desegregation Without Turmoil, 1976; Fulfilling the Letter and Spirit of the Law, 1976). Among the activities or programs such groups have attempted are the following:

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[11] Some especially interesting studies of the role of community elites in the school desegregation process can be found in Crain et al., (1968); Fulfilling the Letter and Sprit of the Law, (1976); Rodgers & Bullock (1972).

1. speakers' bureaus spending informed people to local clubs, blocks, and schools to explain the desegregation plan and the need for peaceful cooperation;
2. neighborhood meetings to develop local coalitions;
3. community forums where representatives of various groups could present their views on elements of a good desegregation plan;
4. telephone "hotlines" or rumor clinics;
5. media coordination and the placement of positive stories about desegregation;
6. mobilization of influential community persons;
7. generation of resources for special school programs;
8. use of the clergy to make sermons on the topic of good racial relations;
9. displays in banks and businesses that showed how the school system was organizing for new feeder and transportation patterns.

In addition, in several communities citizens have acted as monitors, gathering data on a school system's positive steps (or lack thereof) to desegregate the schools. Potential publication of examples of racial discrimination could be used by monitors as part of a broader conflict strategy to hold educators accountable to parents and community groups.

Another popular community effort relevant for desegregation is the development of new resources for schools. In addition to money, parents may create a consensus with educators to use the volunteer labor of community groups to help teach new classes, monitor buses playgrounds and lunchrooms, staff innovative field trips, or expose students to various previously hidden segments of the community. As parents and community members contribute their resources to school affairs, whole segments of the community that have seldom encountered each other may discover the extent of their misconceptions, fears, differing styles, or conflicting expectations about each other.

In addition to the ways in which members of the external community can aid in school desegregation programs, the school organization itself can change in various ways. Attempts to study and alter the structure and process of the school organization often collect various factors together into a concept of "school climate". This is a general notion of the quality of racial and intergroup relations among all members of the local school - administrators, teachers, service personnel and students. In an elaborate study of these factors in many schools, Forehand and Ragosta suggest that the organizational "methods and structures" of effective desegregated schools include (1976):

1. multi-ethnic teaching methods;
2. home and school communication, cooperation and confrontation when necessary;
3. equitable rules and regulations for students;
4. principal leadership;
5. human relations activities in the student curriculum;
6. staff retraining;
7. interracial achievement grouping;
8. fairness and equity throughout the school.

The key individual in making such changes work is probably the school principal. "Affirmative administrative leadership" requires forthright and unequivocal actions to create a positive interracial climate.[12]

Changing the nature and operation of the educational staff appears to be another appropriate tactic for facilitating school desegregation. Among many new and specialized staff roles, the most common are: human relations officer, community liaison officer, student advocate, ombudsperson, teacher aid, bus monitor, multicultural expert and counselor (Fulfilling the Letter and Spirit of the Law, 1976).

Effective desegregation efforts also require the development of a staff supportive of a high quality of race relations within the faculty. In general, racial equity and harmony in a staff can be a signal to students and the community that traditional stereotypes can be surmounted. In many schools, such considerations require affirmative action programs for hiring and supporting minority staff members, and many communities included in the U.S. Civil Rights' Commission Study reported increases in the numbers of minority staff members during and subsequent to desegregation efforts (Fulfilling the Letter and Spirit of the Law, 1976). Staff retreats, seminars and other mechanisms aimed at improving racial interaction patterns also have been used in a wide variety of districts.

Students are an important part of the school organization, and their problems and opportunities are heightened when they, as during desegregation, are under the stress of school and community changes. Weinberg's review of the literature on desegregation identifies several studies that indicate that "student involvement and responsibility for the school's program was...vital" in producing positive interactions (1977: 212). In a similar vein, Coulson and his co-workers report that among secondary students, "views of their control over the environment, as measured by the 'locus of control' scale, was positively associated with reading and math outcomes" (1977: vii-15). Thus, these researchers suggest that students be given more control over aspects of the school curriculum and instructional materials. Obviously, the implications for new student roles are far wider than that and could affect an entire series of organizational factors that currently exclude youth from meaningful input on major school decisions and policies. For instance, students have participated in citizen committees drafting desegregation plans and have served on student-faculty committees to establish and administer rules pertaining to student life in the desegregated school (Fulfilling the Letter and Spirit of the Law, 1976).

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[12] Discussions of the principal's role in desegregated schools can be found in Orfield, (1975), St. John (1975), Metz (1978). Good analyses of the critical support higher level administrators must provide such principals have been prepared by House (1974) and Rodgers & Bullock (1972).

The character of student rules and regulations (and of resultant discipline codes and procedures) is one area in which issues of school authority and norms may come together. Thus it is a key target for change in the desegregation process. Forehand, Ragosta, and Rock indicate that, "Achievement is significantly related to perception of school fairness" (1976: 39). They argue that students' feelings about racial equity or fairness are so critical that they should be a major focus of desegregation programs, even superceding other goals.

The content of schooling, as reflected in curriculum and instructional techniques, also can undergo changes during desegregation. As new groups of students with varying values and needs-as well as manifold individual differences-come together in a single environment, revised educational content may be necessary. New reading and mathematics programs, multicultural curriculum offerings, bilingual programs, classes devoted to the study and improvement of intergroup processes, and new textbooks that reflect a multicultural approach are all relevant. The USCCR notes that twenty-three of the cities they studied reported curriculum changes, including multicultural or bilingual materials, vocational and career counseling curricula, and compensatory curriculum materials (Fulfilling the Letter and Spirit of the Law, 1976).

Forehand, Ragosta, and Rock (1976) stress the importance of classroom study projects that focus on minorities and of explicit discussions of race-related matters in class. Numerous school systems have developed classes on human relations or intergroup relations, and a vast array of relevant curriculum materials is now available for these ventures.

Another focus of desegregation researchers and practitioners has been classroom or school grouping procedures. Two distinct trends seem to be evident: first, several cities studied in the USCCR reports indicate that the use of tracking was abolished on the ground that tracking often leads to resegregation within the school (*Fulfilling the Letter and Spirit of the Law*, 1976). However, Forehand, Ragosta, and Rock (1976) report that ability grouping within a classroom need not necessarily result in distinct racial groups, and that such grouping often appears to be educationally effective. The difference in these reports is that heterogeneous and shifting ability grouping may permit students to compare and contrast themselves with close and relevant peers while permitting mobility between groups, as appropriate. School wide tracking systems have proven to be notoriously immobile; they often route students into early stratification patterns that also stereotype and isolate race and class groups.[12]

Among the most important issues in school desegregation activities is whether and how changes made in the community and the total school organization filter into the actural site of most interracial instruction-the classroom. One important classroom issue is the pedagogical techniques by which teachers connect classroom racial relations and academic tasks; new techniques that alter racial interaction patterns can reduce the status inequalities created by the external environment.

Recent work by several groups of scholars has begun to explore and document some of the intricate issues and tactics involved in the effective multiracial classroom-such as new forms of participation and rewards.[14] The key issues in this line of inquiry appear to include:

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[13] In addition to the findings of scholarly research, see Hobson v. Hansen 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d. 175 (D.C. Cir. 1969).

[14] The most interesting work on these issues is being conducted simultaneously by several teams of scholars: Aronson, Blaney, Sikes, Stephan & Snapp, 1975; Lucker, Rosenfield, Sikes & Aronson, 1976; Blaney, et al., 1977; Cohen, 1973; Cohen, Lockheed & Lohman, 1976; Johnson & Johnson, 1975; Michaels, 1977; Slavin, 1977; Slavin, 1978. Some of the issues scholars face in applying such research in school desegregation settings are explored in Chapter 4.

1. the need to generate equal status forms of interracial interaction in the classroom
2. the need to design academic tasks that require peer interdependence and the resources of all groups
3. the need to utilize peers in ways that cherish the unique and necessary resources of children of different races
4. the need, on ocassion, to provide prior training to some groups of students so that their resources can be delivered without fear and/or intimidation
5. the need for group task work in the classroom to be rewarded on a group basis
6. the need for a variety of non-competitive norms and tasks for youngsters

New classroom designs have begun to flow from this research; they will be necessary and useful ingredients of any new instructional design in desegregated schools.

These and other changes, at the community, organization or classroom level, require new kinds of skills, attitudes and visions on the part of everyone concerned with interracial education. Even the best conceived organizational and community changes will founder unless educators with the responsibility for working with youth (and for working with other educators) learn and practice new ways of thinking, feeling and acting. Thus, retraining programs of various sorts are necessary. The U.S. Commission on Civil Rights' study reports that 23 of the 29 communities they studied had some sort of staff retraining program incidental to desegregation, and that some of these were in fact mandatory (Fulfilling the Letter and Spirit of the Law, 1976). Other research studies have begun to indicate not only the breadth of such retraining efforts, but their particular nature and impact as well (Coulson, et al., 1977; King, 1980). Unfortunately, many of these retraining efforts were of short duration, and focussed on individuals' attitudes and actions alone. Numerous recent commentaries have stressed the necessity of utilizing retraining opportunities to work with an entire staff on their relationships with one another and with the the organizational structure they inhabit. Retrained individuals, no matter how new and imaginative in their thinking, who re-enter an unchanged organization, will rather quickly revert to prior practices. New organizational relationships, norms, reward patterns and accountability systems are required to encourage and reinforce new behaviors.

The Sequence of Desegregation Controversies: On the Way to the Courtroom

Desegregation of local school districts, and the changes accompanying pupil desegregation, have not taken a smooth and easy path across the nation. These changes are controversial and sometimes have involved very heated and even violent actions and reactions. In fact, the history of these local community controversies indicates that the conflict model is more consistent than the consensus model in helping to understand and chart the course of desegregation. For instance, school desegregation appears to require local citizen groups to challenge customary forms of segregation. Seldom have educational leaders acted on their own initiative to reform racial separation in schooling. In fact, these leaders rather consistently have resisted the initiative for reform taken by local community groups. Eventually, after much pushing and pulling, these challengers and educational authorities end up in litigation. Here, in the courtroom the community controversy is adjudicated. In this section we examine the ways in which the almost universal path to the courtroom develops.

Challenges to local forms of school segregation have been made by various community groups; some composed of minority group members and some reflecting interracial coalitions. They have been generated by grass roots community groups primarily, although at various times and places civic agencies, national and local civil rights' groups, or state and federal officials (U.S. Department of Justice or Education, State or Federal Civil Rights Commissions) have taken the lead.

The kinds of challenges these groups have employed also have been quite varied. Many local groups have begun the desegregation process by presenting local school boards with a petition of grievances, a sort of information campaign or appeal requesting school and community decision-makers to alter unconstitutional patterns of unequal education and discrimination against minorities. In some cases this approach has been combined with efforts from federal or state agencies such as Civil Rights Commission or the Community Relations Service, generating an inquiry or investigation of local complaints. These initial steps generally are consistent with a consensus strategy of change.

When this strategy failed to redress grievances, many groups escalated into a second form of challenge: direct action efforts to place community pressure on civic and educational authorities.[15] This has involved raising a hue and cry, and the generation of concern, anger, and noise about the current state of affairs. These efforts generally have attempted to embarrass public officials, to draw attention to their failure to operate fairly, and to threaten more substantial action should no change occur. After all, as Zeigler & Boss' study of superintendents and board members in a sample of interracial districts noted:

> School governors apparently do not recognize such (racial) difficulties as being problems, a fact that undoubtedly upsets the black citizen. Rather, school governors appear to recognize racial problems only where major issues or crises have evolved (1974: 332).

Strikes and/or boycotts of segregated schools are examples of this form of challenge; so are demonstrations and trashing of inadequate and/or segregated school facilities. In addition, sometimes local groups have appealed to or created a coalition with federal agencies to threaten (or actually act) to withhold funds for the educational system unless it develops a plan to remedy segregation. In all these approaches, the challenging groups have tried to create new local power bases and mobilization efforts to require schools to be operated in different fashion. Clearly a conflict strategy is involved

When these tactics also have failed to redress grievances, or when they have resulted in various groups' being unable to resolve their differences in any peaceful manner, the possibility of litigation looms large. In a considerable number of communities across the nation, aggrieved groups have entered state or federal courts to compel adherence to constitutional requirements for a desegregated and racially equitable school system. In some cases these suits have been generated by local actors, in other cases by national civil rights groups, and in some cases by a coalition of both. Most have been developed by private groups, but sometimes public agencies such as the Department of Justice or even a school system has joined in a coalition suit against another school system. If this is the sequence of challenges we find in many communities, what about educational leaders' responses?

Authorities' responses to challenging groups are as diverse as the challenges themselves. Some responses are clearly positive in nature and a few school leaders quickly developed fair and extensive plans, taking the lead in major desegregation efforts (mobilizing public support, modelling new approaches, etc.). However, they also have included efforts at delay (ignoring requests, putting off responses, denying culpability), tokenism (making minor modifications, creating free choice plans), counter-litigation (or appeals), attack (mobilization of counter-desegregation groups, deligitimization of protest leaders, calling in police for minor matters), and developing minimal or unfair plans (with the burden on the minority, retracking, firing minority staffs). Our analyses of extant case materials suggests that in many if not most communities, local authorities initially resisted the desegregation agenda, and refused to make decisions of a positive character until they were forced to (usually by the courts).[16]

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[15] What is common in these controversies is a sequence such as the one we describe. However, not all communities follow a strictly sequential pattern.

Typical responses of school authorities, at least during the initial stages of the local dispute, included denial and delay. Examples of a set of such actions include:

- ignoring of challenges
- denial that segregation exists
- denial that segregation is the fault of school authorities, and argument that hence it is not their responsibility to correct
- delaying tactics
- creation of citizen committees to "study the problem"

In addition, some school system leaders went beyond denial and offered a counter-challenge, engaging in the following sorts of tactics:

- public media disputes of the existence of segregation
- legal action by education leaders to counter plaintiff suits
- mobilization of community opposition
- encouragement of opposition

A less overt form of resistance was evident in leaders' responses which appeared to start the process of change, but which fell far short of instituting a desegregated system:

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[16] Many formal and informal reports of these community challenges and authorities' responses exist; some are publically accessible and others are in the files of civil rights organizations and governmental units. Scholarly and popular literature of early southern efforts is available in Carmichael & James (1957); Anderson (1966); Blaustein and Fergeson (1962); *School Desegregation in Ten Communities* (1973); Killian and Grigg (1964); Morland (1963); Aiken and Demerath (1967). Moreover, we have analyzed case study materials on later northern and southern cities from several sources, including the rich series of reports prepared by the United States Commission on Civil Rights (*Fulfilling the Letter and Spirit of the Law*, 1976) and the many separate documents backing up this report. Other such data is available in scholarly anthologies such as Crain, et al. (1968); Mack (1968); Kalodner and Fishman (1978).

- tuition grants for attendance at (white) private schools
- redrawing a few school attendance boundaries, consolidating a few schools and closing a few schools (usually in minority neighborhoods)
- minor curriculum changes
- adding a few minority teachers and/or administrators
- implementation of free choice or open enrollment plans
- establishing a few magnet schools

And some authorities designed plans which led to incomplete desegregation, or which prompted some desegregation on a basis that excessively burdened the minority community.

- busing plans that mostly bus minority students, and that bus minority students further than whites, at a younger age
- plans to close many minority schools
- plans that allow quick resegregation in tracks, and in social and informal events within the desegregated schools
- decrease (or lack of increase) of minority teachers and administrators
- disproportionate numbers of minority student suspensions and expulsions

Finally, in some communities positive programs were undertaken, although usually not at the initial stages of the controversy:

- adoption of a comprehensive plan to create racial balance
- instituting system-supported teacher in-service training
- changes in the curriculum reflecting a minority emphasis
- generation of community education programs outside of school
- increase in hiring minority teachers and administrators
- vigorous verbal support (in media and meetings) for school desegregation
- activities designed to help students of different races meet, know and work with one another
- joining plaintiff parties in suits promoting school desegregation
- attempts to secure federal, state or private funds for new programs relevant for minority groups needs or for problems likely to be ocassioned by desegregation

Although authorities' responses sometimes neutralized or destroyed challenging groups, and their ability to gain support in the local community, these highly charged efforts at dispute settlement generally failed.[17] Over time, the minority community usually demanded more adequate responses to the equal opportunity agenda. If school and community authorities could or would not develop more positive responses, new problem-solving or dispute settlement mechanisms had to be discovered. The courts were an obvious answer. For minority groups and civil rights' activists the courts looked like the only reasonable hope for redress without violence. Moreover, from the vantage point of local authorities, having an agent of the federal government, a District Court Judge, make the desegregation decision was a lot safer than their making it themselves. As Kalodner and Fishman note: "Many school boards pursue from the beginning a course designed to shift the entire political burden of desegregation to the courts" (1978: 3). Thus, throughout the country, escalated challenges and responses led to litigation. Kluger (1975) reports the ways in which the litigative efforts culminating in the Brown, et. al, cases slowly wound their way through several levels of political and judicial action before they appeared before the Surpeme Court. Buoyed by the Supreme Court's decisions in 1954 and 1955, many people concerned with redressing inequality in schooling saw the courts as a truly reasonable hope. Others saw it as an avenue for further delay and/or settlement of a messy controversy.

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[17] In a very few cases, authorities' positive responses either preceeded community pressure or were undertaken quickly and forcefully enough to create substantial desegregation and truly satisfy minority concerns. However, most of the time, according to a survey of superintendents themselves, community challenges generated the pressure, and the continuing pressure, to desegregate schools (Reviewing a Decade of School Desegregation, 1977).

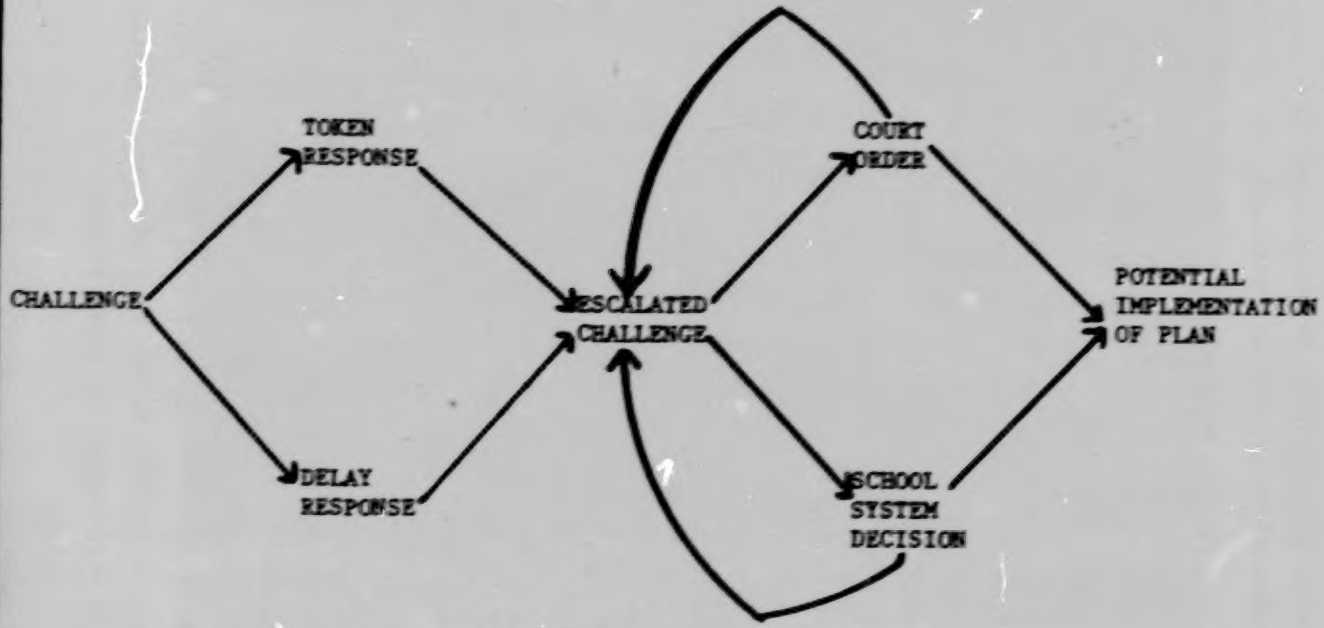
This approximate sequence of challenges and responses is diagrammed in Figure 1.2. It is consistent with the evidence from the case studies referred to in footnote 16 and reported elsewhere (Rothenberg & Chesler, 1980). Moreover, once a local dispute reached the litigative stage it was by no means over. The courtroom process was utilized as an alternative dispute settlement arena, but even so, court decisions often were appealed by various parties. Thus, many controversies continued over a period of several years, ocassionally returning to the community and to the courtroom. The federal courts, after all, have been cautious in their adjudication of these controversies in "their" pursuit of equal opportunity. Indeed, as Nystrand and Staub indicate:

> judicial participation in education matters has been essentially a conservative process that endeavors to support state and local school officials insofar as their actions are consistent with constitutional guarantees (1978:27).

The courts, after all, are deeply embedded in the social structure and fabric of their region and local community. Moreover, they have been reluctant to intrude into school management, into an area of professional expertise and local control. Despite these constraints, the lack of local communities' ability to resolve these controversies has resulted in a long history of court involvement in school desegregation cases. In the next chapter we review the actions of the federal judiciary with regard to these issues.

Figure 1.2

Typical Stages in School Desegregation Controversies


CHALLENGE
TOKEN RESPONSE
DELAY RESPONSE
ESCALATED CHALLENGE
COURT ORDER
SCHOOL SYSTEM DECISION
POTENTIAL IMPLEMENTATION OF PLAN

CHAPTER 2: THE LEGAL CONTEXT OF SCHOOL DESEGREGATION[1]

In the years following Brown vs. Board of Education (347 U.S. 483.1954), a group of "friendly critics" supported the outcome of the opinion but found fault with the reasoning.[2] Today, 26 years after Brown, there remains a general sense of unease about the meaning of the school desegregation cases.[3] The opinions often seem disjointed, loosely reasoned, and productive of conclusions which their premises cannot support. Given that Brown settled the question of whether the state could pass laws segregating black and white children, to what degree do later cases go beyond this passive duty, to assert a more active duty to work toward integregated schools? Can such a duty be justified under the 14th Amendment? If so, why have the courts failed unambiguously to provide this justification?

This chapter addresses these questions in two parts. First, we distinguish between two general approaches to the equal protection clause, one we call an Individual Model and the other a Structural Model. Second, we use a review of key cases to discuss the reasons why the Supreme Court has not adopted a more coherent line of argument, one consistent with either of these models.

Two Approaches to the Equal Protection Clause

The Equal Protection Clause of the Federal Constitution is embodied in the 14th Amendment.

> Sec. 1...nor shall any state deprive any person of life, liberty, or property, without due process of law: nor deny any person within its jurisdiction the equal protection of the laws...

It has been the basis for most school desegregation litigation. Scholars and practicing attorneys attempting to understand these cases, either for strategic or theoretical reasons, often have had to review the meaning of this Amendment, and its impact on the peculiar shape of desegregation litigation. Preparatory to the Brown decision, for instance, the Supreme Court asked attorneys to comment on the 14th Amendment, as follows:[4]

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[1] An expanded version of this discussion, with a more substantial review of key cases, can be found in Sanders, 1980.

[2] See, for instance: Wechsler, 1959; Cahn, 1955, Cahn, 1956.

[3] See for instance: Yudof, 1978; Fiss, 1974; Fiss, 1979; Bell, 1976; Bell, 1980; Dworkin, 1977.

1. What evidence is there that the Congress which submitted and the State legislatures which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in the public schools?
2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
    a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
    b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force.

These questions go to the root of a search for judicial authority and legitimacy in the school desegregation cases. They seek help in defining the context within which these cases occur.

Once the Court was willing to use the 14th Amendment as the basis for litigation of these cases, a new set of problems arose. The court had moved further in the direction of adjudicating public policy questions. Recently, Chayes has analyzed the course of various controversial cases involving public policies, in terms of the differences between "private law" and "public law" models of litigation (1976). The private law model is the typical litigative style, and its defining characteristics are that: the lawsuit is bipolar and retrospective; right and remedy are interdependent; the lawsuit is a self-contained episode; and the suit is initiated and controlled by the parties. Since public law issues rarely fit neatly into this format, Chayes presents a second set of characteristics which define public law litigat Here a party structure is not necessarily bilateral, and even unrepresented groups' claims intrude on the courtroom process; the cases may go on for years, returning to court several times, remedy is forward looking and almost legislative in character; and the judges often take control of the suit. As Chayes notes, "The subject matter of the lawsuit is not a dispute between individuals about rights, but a grievance about the operation of public policy (1976:1302)".

Chayes' discussion closely parallels another set of distinctions among these cases, one that analyses alternative views of the nature of racial inequality and community controversy - in schooling and in society. For instance, what we call the Individual model views the causes of racial inequality as prejudice, and more or less intentional discrimination on the part of various actors. Thus,

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[4] See Friedman (1969:177), and Immediate Order of the Supreme Court: 345, U.S., 972, June 8, 1953.

in general the individual model views school segregation as a problem caused by individual actors, and affecting citizens as individuals. The Structural model sees racial inequality as caused by, and deeply embedded in, the organizational structure and operations of institutions throughout our society. Thus, the "acting party" in segregated schools is not an individual; it is a network of forces. Moreover, the affected party is a group which is kept in a certain position due to these institutional arrangements.[5] These two ways of viewing racial inequality, the Equal Protection Clause, and school desegregation cases must be understood at three different levels: at the level of attributing responsibility, at the level of determining the nature of the matters in dispute, and at the level of the desired remedy.

Responsibility

In ajudicating equal protection cases, like other disputes, a primary consideration is what it is to be responsible. Key actors' responsibility may vary, depending upon the extent to which it appears that one's intentions and one's negligence are relevant. A responsibility standard which requires conscious intentions must be based on an individual model: only individuals can properly be said to have intentions. Organizations cannot have intentions, except through the individuals who staff them (Coleman, 1974).

As it relates to school systems, an individual understanding of the Equal Protection Clause will look to members of the senior administration and the school board. It will examine their intention to segregate and determine whether they have acted in violation of the 14th Amendment. A structural understanding, on the other hand, will look to the workings of the entire school system. Using the organization as a unit of analysis makes it inappropriate to judge responsibility by assessing persons' intentions. Rather, the way the system actually works, in terms of outcomes produced, is critical. Thus evidence of continuing segregation, rather than any intent to segregate, is the most appropriate measure.

The matter in dispute

An individual model of the matter in dispute is influenced by the nature of the responsibility rule. It asks whether there have been specific school board incidents of wrongdoing to assess the responsibility of the board for those incidents. In Fiss, "dispute resolution" model, which approximates an individual model, adjudication examines an "incident, or in the language of pleading rules, the 'transaction' or the 'occurence'" (Fiss, 1979:18). A structural model, on the other hand does not define the matter in dispute as an incident, or even a set of discrete incidents. Rather, it looks at the relation of the school system to the outcomes or achievement of equal protection - is there segregation or not? From Fiss' structural viewpoint the focus should not be upon a particular incident, but upon "the conditions of social life and the role that large scale organizations play in determining those conditions (Fiss, 1979:18)."

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[5] These two views have considerable overlap with consensus and conflict paradigms of social systems and social change, as discussed in Chapter 1 of this report.

An individual model, moreover, tends to define issues more narrowly. The realm of legal relevance is specifically directed to the purpose and impact of particular decisions within the control of the school board. A structural model looks to the wider set of social conditions within which the school system operates, including such matters as community housing patterns, zoning decisions, etc.

Remedy

In constructing a remedy, the individual model is solely concerned with reestablishing the rights of the individual. The structural model, on the other hand, also is concerned with altering the status of a group which found itself in a position of "walled-off inferiority" (Black, 1960).

Thus, the individual model interprets the Equal Protection Clause as speaking to individuals, and to that extent neglects the social and historic determinants of their position. A structural model is concerned with the historical position of groups, and historical structural inequality is at the heart of this understanding. This point of view is expressed in the Slaughter House Case (16 Wall 36, 21 L. Ed. 394. 1873).

> We repeat then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made free man and citizen from the oppressions of those who had formally exercised unlimited dominion over him.

Only ten years later, however, in the Civil Rights Cases (109 U.S. 3, 27 L. Ed. 835. 1883), a much more ahistorical and individual interpretation was made. The structural position of blacks was discounted by Mr. Justice Bradley, who concluded that open housing statutes passed by Congress under the 14th Amendment were unconstitutional. His opinion reads in part:

> When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseperable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, he ceases to be the special favorite of the laws, and when his rights, as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.

Within the individual model, then, the purpose of the Equal Protection Clause is the creation of equal opportunity between citizens. With regard to public education, this involves equal educational opportunity, both academically and psychologically. The individual model is thus concerned with the questions of "micro justice". The adequacy of remedy is to be measured by the existence of formally neutral principles which allow individuals to choose and to achieve according to merit.

A structural understanding, however, focuses upon a second virtue, that of an interracial community of equals. The objective is not solely to provide juridical equality between individual citizens, but to bring black Americans into the mainstream of the society. Put boldly, it asserts structural integration (Lohman and Gilman, 1980) as one of the constitutional values embodied in the Equal Protection Clause.[6] With regard to school desegregation, "community" must mean two things. First, it must mean that segregation, in the traditional sense of the separate education of white and black children, ceases. Second, it must mean greater equality in educational attainment and achievement. Once again, the equality implied by the structural model is more than equality of opportunity for individuals; it is equality in school outcomes and environmental conditions between groups (Fiss, 1976). The structural model thus is fundamentally concerned with questions of "macro justice" (Brickman, et al., 1980). The appropriateness of a remedy is measured by its ability to produce certain distributional properties (e.g., racial balance, greater equality of academic success). Such a view is deindividuating, and does not assume or require a fit between the attributes of individuals and their rewards.[7] Rather it places a priori constraints upon the allowable form or distribution of resources.

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[6] See Fritz, 1963; Washburn, 1975; and footnote 2, chapter 1 of this report.

[7] Thus, individual merit is not the key link between background characteristics of individuals and their attainments and rewards. Rather, group position, and the (discriminatory) treatment visited by social agencies, is a critical factor. (See pp. 7-9 , Chapter 1)

Figure 2.1 summarizes the two models.

The two models are, of course, ideal types. In real cases it is possible to adopt intermediate positions. For example, the adoption of a "negligence" standard for school board actions, i.e. whether they could foresee the outcome of their decision, is an intermediate step with respect to responsibility (Oliver vs. Michigan State Bd. of Ed. 508 F. 2d 178 - 6th Cir. 1974). Negligence is not the same as intent to cause harm, but neither does it mean the same as "no responsibility" for outcomes. The organizational or community context of individual action is a critical issue in a negligence standard, because it helps determine what (other) actions might reasonably have been taken. Moreover, it is possible to use a series of discrete incidents to construct a "pattern or practice" of school system behavior; once again, a pattern stands between an adjudication of individual incidents and a direct analysis of the social relationships produced or perpetuated by the school system (See Penick vs. Columbus Bd. of Ed., 583 F 2d 787, 314 - 6th Cir. 1978).

The difficulty with the school cases is not, however, that the courts sometimes adopt middle positions. It is, we argue, that the courts consistently have adopted contradictory positions. They have clung to an individual model of responsibility, maintained an uncertain position concerning the matter in dispute, and yet, with few exceptions, produced remedies which can only be understood within a structural model. Even at the remedy level, however, the courts have never appreciated fully the implications of a structural understanding; therefore, remedy has never pursued the logic of a structural model to its conclusions.

The Cases

From Brown through Swann: Toward a Structural Model of Rational Remedy

In Brown, and in the Southern cases to follow, the issue of intentional violation was so obvious that there was little occasion to come to grips with the standard of responsibility. There was no reason to examine whether intent (the matter in dispute) was a necessary element in providing a school violation, nor whether the accused school board could successfully plead an alternative "neutral" purpose for its action sufficient to justify a given practice, (e.g. a "racially neutral" neighborhood school policy as a reason for segregated schools).

The question that did arise was that of remedy. After Brown I, the court gave the parties an opportunity to go home and think about this problem. In 1955, in Brown II (349 U.S. 294 1955), the court took its first tentative steps toward

Figure 2.1: Two Models of the School Desegregation Cases

Issues	Indivdual	Structural
Responsibility	a) Concerned with individual or collective acts	a) Concerned with institutional behavior
	b) Concerned with the intentions and purposes of these individuals or collections of individuals	b) Less concerned with intentions, more with institutional arrangements and outcomes
Matters in Dispute	a) Looks to specific incidents that produce inequality	a) Looks to social conditions that produce inequality
	b) Adopts a narrow focus of legal relevance: the purpose and impact of school board decisions	b) Adopts a wider frame of legal relevance: the conditions within which the school system operates
Remedy	a) Adopts an ahistorical perspective treating people as juridical equals	a) Adopts a historical structural perspective: considering the substantive inequalities between blacks and whites in America
	b) Focuses upon the treatment of individuals as equals (micro justice)	b) Focuses upon building equality and community between groups (macro justice)

fixing remedies in these cases. Believing that lower courts would best be able to assess each local situation, the Supreme Court remanded the Brown cases to the District courts with the directive that they should "take such proceeding and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed."

As indicated in Chapter 1, most communities adopted a strategy of outright defiance. When pushed, they adopted what came to be called freedom of choice plans. These plans kept the old dual system intact but gave individual school children the right to ask for a transfer to a school predominately of another race. Such a remedy expresses an individual understanding of how to bring about change, disregarding all structural barriers to desegregation and the exercise of these rights.

From an individual point of view these plans were racially neutral. The freedom of choice applied to both white and black children, and each child could go to the school of his or her choice. But as the outcomes indicate, the effort was both a subterfuge and a failure. Some place in the south there may have been some white children who chose to attend a formerly black school. If so, the cases in point do not come readily to mind. Any desegregation that did occur rested on the shoulders of black children going to formerly white schools. And for a variety of reasons they did so in relatively few numbers.[8]

There was, however, an element to the Brown decision which boded ill for the individual model. In remanding the cases to the lower federal courts, the Supreme Court said they should be guided by "equitable principles". At the time, this might have appeared to be a further retreat from a strong desegregation stance, since lower courts could consider various practical problems in reconciling public and private needs in the cases. Equity, however, has always been the bastion of a more substantive (result-oriented) type of justice in Anglo-American law. In giving the district courts wide discretion to determine remedy, the Supreme Court provided them with substantial powers to require that the remedies suggested would in fact have the consequence of desegregating schools.

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[8] Most obviously the plans tended to disregard (or purposively ignore) the intimidation which kept some black families from exercising this choice (See Green vs. County School Bdg. of New Kent County 391 U.S. 430, at 4-n5; Racial Isolation in the Public Schools, 1967). More subtly, the plans typically did not attempt to alter the educational program within formerly white schools. Equality was defined as equality of opportunity with little or no consideration given to helping black children overcome years of inferior schooling Not only did this approach impede the achievement of educational equality, it also acted as a deterrent to black parents when they considered overcoming the community barriers to sending their children to the "white school".

An important element in the Court's increasing concern with results was the passage of the 1964 Civil Rights Act and the 1965 Elementary and Secondary Education Act; the latter providing millions of dollars in federal money to local school districts. Title VI of the Civil Rights Act gave the Department of Health, Education and Welfare the power to withhold the ESEA money if schools remained segregated. The HEW guidelines looked to results, and they sometimes were given great weight by the courts in determining whether school boards had made progress towards compliance with Brown (see United States vs. Jefferson County Board of Education 372 F. 2d 836 - 5th Cir 1966).[9]

In 1968 the movement toward a structural model of remedy reached the Supreme Court in Green vs. County School Board of New Kent County (391 U.S. 1968). The question was whether a freedom of choice plan adopted in a sparsely populated eastern Virginia county could pass muster. And the key issue was not whether it evidenced a neutrality toward black and white children, but whether it worked. In its opinion, the Court said that the adoption of a freedom of choice plan (eleven years after Brown) does not end the inquiry, but merely begins it. The Court then provided a 1968 interpretation of what Brown II meant.

> School boards such as the respondent then operating state-compelled dual systems were...clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch... The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.[10]

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[9] On this issue see; Dunn 1967; Recent Cases, 1967; Comment, 1967.

[10] There were two companion cases to Green: Raney v. Board of Education of Gould School District (391 U.S. 450); and Monroe v. Board of Commissioners of the City of Jackson, (391 U.S. 450). The Raney facts were basically similar to those in Green. In the Monroe case, the trial court had established a neighborhood plan for junior high schools, but there was a "free transfer" provision allowing any child to transfer to another school if space were available. The unsurprising result was to maintain the racial character of the high schools. One remained all black, another 99 1/2% white. The Supreme Court rejected this plan. During the preceeding year the 5th Circuit had reached the same result on freedom of choice plans in an appeal consolidating a number of tests of HEW guidelines (United States vs. Jefferson County Board of Education, 372 F. 2d 836, 5th Cir. 1966, aff'd en banc, 380 F. 2d 385 5th Cir. 1967 cert. denied, 389 U.S. 840 - 1967). In this case, Judge Wisdom said: "the only school desegregation plan that meets constitutional standards is one that works" (372 F. 2d at 847).

The Green Case was a key statement of the structural approach. New outcomes, not intentions, was the burden on respondent school boards. These findings supported HEW guidelines, and thus asserted that Brown did not simply stand for a cessation of discrimination, but rather the immediate adoption of a plan which would disestablish the dual school system. The key principle upon which school districts had relied, that the Constitution required an end to segregation, but did not require any affirmative acts toward desegregation, was swept aside.[11]

During the next term, even after the Nixon administration had taken hold, the court refused to delay plan implementation in 33 Mississippi school districts, reaffirming that it was the "obligation of every school district to terminate dual school systems at once and to operate now and hereafter only unitary schools" (Alexander vs. Holmes County Board of Education, 396 U.S. 19 at 20. 1969).

Remaining after Green and Alexander is the question of the scope of permissible remedies. In the Swann case the court moved further toward a structural model of remedy. By arguing that the duty of formally dual school systems was to "eliminate all vestiges of state-imposed segregation." (402 U.S. at 15), and by providing for comprehensive remedial orders, the court created an evidentiary presumption that racial imbalance in formerly dual systems constituted a prima facie showing that the dual system had not been dismantled. Perhaps the key word is "dismantle": it implies an organizational structure which must be altered. "Neutral" solutions will not suffice when the demographics of school assignment policies and residential localtion fail to produce desegregation. Most fundamentally, the court sees the racial balance part of desegregation as a question of "macro justice." The primary criterion for adequacy in a desegregation plan is not individual opportunity to desegregate, or presumed individual advantage from desegregation. Rather it is the distribution of white and black students, per se.[12]

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[11] Upon remand from the Supreme Court, the district court in Briggs vs. Elliott (132 F. Supp. 776 F.D.S.C. 1955) has so held, and school boards relentlessly had urged this interpretation on the courts.

While many southern cases remained to be litigated, and while many continued in litigation, the development of school law was about to move north.

The Northern Prelude

Why was it improper to run a dual school system? In the cases leading up to Brown[13] the court had slowly retreated from an equal facilities argument toward an argument based upon the "intangibles" of education, such as the ability to engage in discussion and exchange views with fellow students. In addition, the Brown opinion speaks of scars to personality caused by the fact that segregation "generates a feeling of inferiority as to their (black students') status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

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[12] Again, as in Green, important issues were left undecided in Swann. First, the court explicitly refused to decide whether a showing that school segregation is a consequence of types of state action other than school board decisions is a Constitutional violation requiring remedial action by a school desegregation decree. This issue re-emerged in Detroit, with the Court onceagain side-stepping the question. Thus, the Court has consistently avoided the key question of whether and which structural issues are matters properly in dispute.

Second, at the conclusion of his opinion, Chief Justice Berger stated, "At some point, these school authorities and others like them should have achieved full compliance with this decision in Brown I. The systems will then be unitary in the sense required by our decision in Green and Alexander. It does not follow that the communities served by such systems will remain demographically stable, for in a growing mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." The issue left unanswered by this passage is exactly what constituted a "unitary" system under Green, Alexander, and Swann. Attempts by some judges to declare districts unitary have met with mixed results. One point of view might hold that the affirmative duty to maintain a balanced system should never be removed from a formally dual system, as long as continuing imbalance can be avoided. (See Judge McMillan in Swann, 334 F. Supp 623, W.D.N.C. 1979) The language in the last paragraph of Swann, however, suggests that a less rigid interpretation of the state's affirmative duty may be in order. As yet, the Supreme Court had refused to deal with this issue.

[13] Missouri, Ex. Rel. Gaines v. Canada, 305 U.S. 337 (1937); Sipuel v. Oklahoma State Board of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

A fair reading of Brown would conclude that the court believed segregated education was unequal, even in "equal" facilities, because of the real if intangible harm it caused black children, both psychologically and educationally. Many writers soon argued that the case could not possibly hinge upon the question of whether black children were in fact harmed; or, if they were, whether desegregated education would overcome this harm.[14] The language in Brown lends some support to such a view, for the court speaks of segregation as being "inherently unequal", and inherent would be an unusual choice of words if what was at stake was some (time-bound and place-bound) empirical observation.

Nevertheless, the "harm" theory of Brown was attractive to plaintiffs because it seemed to sweep away the de jure - de facto distinction in these cases. If there were harms of an educational and psychological nature in segregated schools, they would exist regardless of the source of segregation. Such an argument was especially appealing in northern cases, where proof of state segregative action would be more difficult. But in circuit after circuit, northern courts did not find school districts in violation of the constitution, even though the systems were to some extent segregated, and even though there was some evidence of education harm (Bell vs. School City of Gary, Indiana, 324 F. 2d. 209 - 7th Cir. 1963; Barksdale vs. Springfield School Committee, 348 F. 2d. 261 - 1st Cir. 1965; Downs vs. Board of Education of Kansas City, 336 F. 2d. 988 - 10th Cir. 1964; Deal vs. Cincinnati Board of Education, 348 F. 2d. 55 - 6th Cir. 1966). In all of these cases, the primary theory advanced by the plaintiffs was that black children had been denied equal educational instruction. The plaintiffs attempted to advance the structural argument that de facto segregation alone was sufficient to require a remedy, because it had the same harmful effects on northern black children that de jure desegregation found in the south had on southern black children.

The decisions in these cases exhibited a general unwillingness on the part of the lower courts to adopt a structural interpretation of Brown based upon the premise of educational harm. They refused to attribute inequalities in education to structural characteristics of the society and to take a macro-justice perspective. Instead, they adopted what we called in Chapter 1 a "consensus" model of achievement, which attributes educational inequality to background characteristics of students which school systems are working (albeit unsuccessfully) to overcome. A "conflict" model , which would attribute inequalities to the social organization of instruction, presumably would have moved the courts toward a structural model of violation.[15]

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[14] See citations in Footnote #2, Supra. Both Cahn and Clark made structural arguments regarding this case (the structure of constitutional law and the structure of racial stigmatization), even though they disagreed on the use of social scientific evidence.

Clearly the lower courts were more receptive to a line of arguments consistent with the individual model: that the school boards specifically had engaged in actions with the purpose and effect of segregating schools. Such an argument had won early on in Taylor vs. Board of Education of New Rochelle (191 F. Supp. 181. S.D.N.Y. 1961), it had been part of Judge Skelly Wright's decision in Hobson vs. Hansen (296 F. Supp. 191. D.C.C. 1967), and following that case had proved successful in several cities (Spangler vs. Pasadena Board of Education 311 F. Supp. 501. D.C. Cal. 1970; Johnson vs. San Francisco Unified School District, 339 F. Supp. 1315. N.D. Cal. 1979; United States vs. Board of School Commissioners, 332 F. Supp. 655. S.D. Ind. 1971 [Indianapolis]; Booker vs. Special School District N. 1, 351 F. Supp. 799 D. Minn. 1972 [Minneapolis]; Davis vs. School District 443 F. 2d. 573. 6th Cir. 1971 [Pontiac]; Bradley vs. Milliken, 338 F. Supp. 582. E.D. Mich. 1971 [Detroit]).

Denver and Detroit

In 1973 and 1974 the Supreme Court turned to Northern systems, and in two cases established the basic line of argument to be followed in non-southern litigation. Denver plaintiffs based their claim for relief both on intentional acts of the school board (efforts to separate white and black children in the changing neighborhood of Park Hill); and on the grounds that the predominately black schools in the "core city schools" provided unequal educational opportunities (Pearson and Pearson, 1978). In his opinion, Judge Doyle (313 F. Supp. 61) concluded that the school board intentionally took steps to keep the Park Hill schools segregated, but found that segregation in the "core city schools" was not intentionally created. He did find, however, that "an equal education opportunity is not being provided " in these schools, and that they, too, must be desegregated as a way of overcoming the effects of segregation. Both sides appealed Judge Doyle's order.

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[15] Compare Barksdale v. Springfield School Committee (237 F. Supp. 543. 1965) supporting a de facto rule, where the judge urged that racial concentration in one's school communicates to the black child that blacks are different from (inferior to) white children; and Bell v. School City of Gary (213 F. Supp. 819 1963) rejecting a de facto rule, where the trial judge stated: "A comparison of achievement tests sheds little or no light on the quality of instruction unless there is a corresponding showing of ability to learn."

The Tenth Circuit opinion (445 F. 2d. 990. 1970) affirmed Judge Doyle's finding that the Park Hill schools had been intentionally segregated. As to the Core City Schools, however, the appellate court rejected the trial court remedy. It agreed with Judge Doyle that "a neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools, provided that plan is not used as veil to further perpetuate racial discrimination" (445 F. 2d. 1004). Accepting Judge Doyle's finding that the segregation in the Core City Schools was de facto in nature, the Tenth Circuit concluded that the Constitution provided no remedy for segregated schools which are in some way educationally inferior, if the segregation is not caused by state action. Moreover, the Appellate Court concluded that the plaintiffs, who had the burden of proof in this matter, had failed to meet it.[16]

The Supreme Court also rejected a structural approach based upon alleged unequalities in student performance alone. Despite separate opinions by Mr. Justice Powell and Mr. Justice Douglas, the court refused to adopt a purely structural model of violation based upon the fact of separation,per se. Those two justices would have abolished the de jure - de facto distinction and declare segregated schools inherently unequal.[17] Had the court adopted such a position, it would have placed an affirmative duty on school boards to desegregate upon proof of educational harm to black children - regardless of the specific source of harm or any intention thereto. Mr. Justice Douglas's position rested upon the rationale that the distinction should be abolished because all school assignments are school system decisions, and therefore state action; i.e. all is really school board intention (413 U.S. 189 at 215, 216). Mr. Justice Powell, however, provided a different rationale, closer to what we have called a structural approach.

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[16] It may be helpful to ground the burden issues in the testimony which actually goes on in such trials. What is almost always presented by plaintiffs is testimony about site selection, boundary drawing, assignment of teachers by race, etc. If the judge is convinced, as Judge Doyle was in the Park Hill area, that these choices tend to show a segregative purpose on the part of the board, then the board must go forward with the evidence, most basically by arguing possible excuses to the activities under investigation. The excuses are almost invariably overcrowding (to justify boundaries), and neighborhood student assignment.

[17] A good deal of literature is favorable to abolishing this distinction and supports Mr. Justice Powell's line of argument (Goodman, 1972; Fiss, 1965; Wright, 1965; Note, 1976). But, for a contrary view, see Graglia, 1976.

> Rather, the familar root cause of segregated schools in all the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns, the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities, (413 U.S. at 222, 223).

The Court, however, refused to abolish the de facto - de jure distinction, and maintained the requirement that the plaintiff prove segregative purpose on the part of the school board. Thus the court backed away from a fully structural model of the violation. Standing alone, the outcome data (e.g. a segregated school system or educational inequality) would not suffice.

In taking these steps, however, the Supreme Court did not retreat from Swann. In proving that Park Hill schools were intentionally segregated, the plaintiffs has shown enough, without rebuttal, to prove that the Denver School system was in fact a "dual school system".

> ...where Plaintiffs proved that the school authorities had carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." (Id. at 201).

Northern school boards' decisions to segregate are only part of the cause of northern school segregation, and thus the correction of only the segregation caused by board action, per se, might lead to a limited amount of desegregation at the remedy stage (Dworkin, 1977). By applying the dual school system language to the North, the court created the legal foundation for one set of remedies, as outlined in Swann, for both the north and the south.

In most large American metropolitan areas, the old core city has become increasingly black, as whites have migrated to the suburbs (Tauber, 1965, 1975; Farley, 1975b, 1978). One such city is Detroit. To desegregate the city alone, even under a racial balance standard, would leave much to be desired. Or so thought Judge Steven Roth. As the Detroit trial progressed, the Board of Education became very much in favor of a metropolitan solution, arguing that a city-only plan would create a totally black city district surrounded by white suburbs. The white parent group, Concerned Citizens for Better Education, also supported a metro remedy, feeling that they alone should not bear the "costs" of integration. The NAACP, on the other hand, was less amenable to this approach. First, they knew it would cause delays in any plan. And second, they had recently litigated a metro case in Richmond, Va., which had been rejected by the Court of Appeals. The Supreme Court had affirmed the lower court by an equally divided 4-4 decision (412 U.S. 92 1973), and Detroit was not the ideal test case to retry that issue. However, Judge Roth was not to be deterred from moving in this direction. In his concern for the metropolitan structure of education, Judge Roth touched upon a key issue concerning remedy. If Brown, qua Keys, required a "root and branch" approach to northern cases, then in cities like Detroit a thorough-going plan of racial balance would produce an entire school district which was in common sense terms racially identifiable. No single school or sub-set of schools would be identifiable legally, since every Detroit school would look like every other school. But in every other sense - the perception of the Detroit area community, the perception of teachers and pupils in the district, and the view from Lansing and Washington - the Detroit schools would be racially identifiable as black. The Constitutional value of a single community would not be served. And insofar as "white flight" and "tipping point" arguments are true, the Detroit schools would likely become more and more identifiable in the future.[18]

The Sixth Circuit, recognizing this logic, upheld Judge Roth in June of 1973 in an en banc hearing (484 F. 2d. 6th Cir. 1973). The legal ground for the wider remedy was the fact that the Detroit schools were segregated by acts of the State of Michigan, and by acts of the Detroit board which were atrributable to the State. It held that under Michigan law, local school districts are merely instruments of the State, created for administrative convenience. The case was appealed by the surburban districts.[19] In a 5-4 decision the

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[18] See Coleman, 1975; Pettigrew & Green, 1976; Ravitch, 1978; Rossell, 1978; Wolf, 1977. Today, the Detroit school district student population is 85% black: in 1975 it was 64% black and in 1965 it was 55% black.

[19] The NAACP and the Detroit Board of Education found themselves on one side against the State of Michigan and the suburban defendants. The Justice department, as amicus curiae, allied itself with the suburbs.

Supreme Court reversed. Chief Justice Burger held that while in some cases it would be proper to desegregate across district boundaries, this could only be done in a case where there was a showing of "a constitutional violation within one district that produces a significant segregative effect in another district" (418 U.S. 717, 744-745). The plaintiffs had the burden of showing such an effect. The court found that in Detroit the violations and their effects were limited to the Detroit district.[20]

If in terms of our models of responsibility, the Denver case is ambiguous, the Detroit case is not. In Detroit, with respect to interdistrict violation, the Supreme Court returned an individualistic interpretation of the liability question. Traditional district boundaries were constitutional unless plaintiffs could show either a specific intention to draw them so as to segregate students, or specific effects of intentional segregation in one district which increased segregation in another district. In a city like Detroit, where city-suburb lines were drawn decades earlier, the first proof is not possible. And as to the latter proof, by refusing to hear the housing evidence the court cut off the most logical way the plaintiffs could show an inter-district structure of discrimination. Specific acts of a board within a district are unlikely to have direct segregative effects in another district, but they may have substantial indirect effects through the housing market. According to the Court, neither city nor suburb had any constitutional duty to act so as to limit interdistrict segregation. Nor did the State Board of Education, which had ultimate legal responsibility for all school district boundaries.

As to remedy, the Supreme Court adopted the individual model's position that the Constitution "does not require any particular racial ballance" (418 U.S. 717 at 740-741). For balance purposes, it equated systems which have 80% black students in each classroom with districts which have 20% black students in each classroom. In southern cases, the drift of the lower court opinions is that a system is not unitary until the school board could do nothing more to further desegregate the schools. In Detroit, this affirmative duty is cut short by the formalism of school district boundaries.

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[20] The court added: "without an interdistrict violation and interdistrict effects, there is no constitutional wrong calling for an interdistrict remedy". (Id. at 745) This latter statement, of course, does not say the same thing as the passage cited in the text. This statement requires interdistrict violations. It is not clear what those would be. If limited to collusion between two school boards to further segregation, they certainly would be rare, although there was one such case in Detroit concerning black students from the Carver school district. The interdistrict violations, however, might apply to separate (and perhaps unintended) actions in separate school districts. Of course many suburban districts have never had an opportunity to "show their colors", in as much as they have no black students. This latter view is more consistent with a structural approach. However, with a strict reading, none of these issues need to be decided in Detroit since the court found no interdistrict effect.

Two kinds of issues remained after Denver and Detroit. First, there is the obvious question of whether, and in what circumstances, a metropolitan plan can be ordered. Second, there are the questions left over from Denver and not discussed in Detroit, about what set of acts and omissions constitute unconstitutional segregation in northern cases. Thus from Milliken vs. Bradley two lines of cases emerged. The first, which may be called the special circumstances cases, pursued metropolitan remedies in situations where it would appear, usually by actions of the state legislature, that interdistrict violations had occured. The "special circumstances" of the metro cases (Wilmington, Indianapolis, Louisville and Atlanta), and the varied outcomes, makes it unclear whether a metropolitan plan can be successful without unique factors. Thus far, the courts have refused to move away from an individual model of violation in metropolitan cases. The second branch of cases directly examined the questions of intent and affirmative duty. In this Chapter, we set aside the special metro cases and discuss only the cases dealing with these questions of intent and affirmative duty.

Questions of Intent and Incremental Harm--The Tentative Retreat to an Individual Model

In the last several years a series of contradictions have arisen with regard to two key elements in the proof of northern cases: a) the nature of the intent required to prove a violation, b) and the degree of desegregation which can be ordered if a violation is found. While the Keys and Milliken cases left unresolved the question of exactly what must be proved to produce a prima facie case of unconstitutional de jure segregation, the proof question involves matters of quantity and quality of evidence.

In terms of quality, we may imagine a continuum from a formal admission that acts are undertaken to segregate, (e.g. southern statutes), to acts which have the consequence of segregating students but for which the board has alternative reasons. Since, in northern cases, it is unlikely that the plaintiffs will uncover any subjective evidence of intent to segregate, the case must rest upon objective evidence of intent. The school board will claim that decisions were made not to segregate, but to further a neighborhood school policy, or to relieve overcrowding. The quality of evidence, therefore, will be enhanced if the plaintiffs can show acts of the school board which cannot be justified by these other alternatives.[21]

The more difficult cases occur when a board's action segregates schools, but the board also has alternative explanations. Here questions of quantity of evidence become relevant. If there is one act which segregates, it may tell us little about a school board. If, however, there are a series of acts, then the objective evidence becomes stronger. The plaintiffs' proofs in school cases generally involve stringing together a series of acts, and a showing that where the board had a choice it consistently took the segregative option. A central question concerning such evidence is whether a plaintiff could prove a prima facie case simply by showing that the school board could foresee that the outcome of its choice (e.g. site selection) would be to perpetuate or further desegregation.

In Kalamazoo the Sixth Circuit answered the question affirmatively.

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies (Oliver vs. Michigan State Board of Education 508 F. 2d. 178, 182. 6th Cir., 1974 cert denied 421 U.S. 963. 1975).[22]

This is a move toward a more structural interpretation insofar as it demands that a board understand and react to the social and demographic organization of the community.

In two non-school cases, Washington vs. Davis (426 U.S. 229. 1976), and Village of Arlington Heights vs. Metropolitan Housing Development Corporation,

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[21] For example, in the recent Columbus case: in the 1960's, a group of white students were bussed past their neighborhood school to a whiter school, and the District Court could "discern" no other explanation than a racial one for the Moler discontinuous attendance area for the period 1963 through 1969 (429 F. Supp. 26. 247).

[22] See also, U.S. v. Texas Educ. Agency (532 F. 2d. 380, 392. 5th Cir. 1976, vacated and remanded sub nom Austin Independent School District v. U.S. 429 US 990. 1977).

(429 U.S. 252. 1977), the court rejected such language. The decisions in these two cases indicate a commitment to an individual model of responsibility. They move away from an interpretation which assesses the validity of acts based upon their impact on segregation, toward a decision based upon purpose. They evidence a willingness to assume that school board decisions may be racially neutral even in the circumstances where the foreseeable impact on the decisions is segregation (Dworkin, 1977). This assumption of neutrality is at the heart of the individual model, and thoroughly consistent with a consensus view of the society and racial inequality.[23]

Impact-Incremental Segregative Effect. While the Detroit opinion cited the Denver opinion with approval, there was one respect in which the opinions are contrary. In supporting the Detroit only plan, and in justifying its refusal to go beyond the city line, the Chief Justice argued that the remedy in school cases may not go beyond the violation. Since there was no proof of an inter-district violation in Detroit, there could be no such remedy. In Denver, the problem of proof had been finessed through the "dual school system" presumption. Such a tactic could have been used in Detroit, since the interdistrict violation problem in Detroit is roughly similar to the intradistrict violation problems in Denver. The Detroit language, however, once again put into question the extent of the permissible remedy and suggested that it must be limited to the segregation actually caused by de jure acts of the state (in this case the school board). Were such standards to be adopted within districts, as well as between them, the remedy which could be ordered would be greatly restricted. Thus the Detroit case cast a faint but threatening shadow over the dual school system presumption in Keys. The shadow seemed to lengthen in Dayton, Ohio (433 U.S. 406 1977).

In Dayton there had been a tug of way between the District and 6th Circuit Court concerning the extensiveness of the remedy. In Brinkman vs. Gilligan (503 F. 2d. 684. 6th Cir. 1974; and 518 F. 2d. 853. 6th Cir. 1975), the appellate court rejected trial court remedies as being insufficiently broad, and finally ordered the trial court to adopt a system wide plan for the 1976-77 year. The record, however, was skimpy as to violation.

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[23] Most instructive here has been the reluctance of Circuit Courts to adopt such a standard, to accomodate the Supreme Courts's swing to an individual model. See, United States v. Texas Education Agency (564 F. 2d. 162, 118-69. 5th Cir. 1977); Armstrong v. O'Connell (451 F. Supp. 817, 824.(E.D. Wisc. 1978). Reading the Mind of the School Board: Segregative Intent and the Defacto/Dejure Distinction (86 Yale L.J. 317. 1976).

On the record, the Supreme Court reversed the 6th Circuit opinion calling for a system wide remedy. It said: "The Court of Appeals simply had no warrant in our cases for imposing the system wide remedy which it apparently did. There had been no showing that such a remedy was necessary to 'eliminate all vestiges of the stae imposed school segregation.'" Judge Rehnquist stated what was required in such cases:

> The duty of both the District Court and the Court of Appeals in a case such as this where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teacher or staff. Washington vs. Davis...If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton School population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system wide impact may there be a system wide remedy. [our italics] (433 U.S. 406, 1977).

Again, as occurred after Washington vs. Davis, the court remanded other cases for consideration in light of Dayton I.[24]

The Dayton opinion was a further shift toward an individual model. In light of Dayton II and Columbus (infra), the importance of the first Dayton opinion is severly limited. Nevertheless, Dayton I sugggested, for the first time since Green, that the remedy, like the violation, should be judged by an individual standard. The language of incrementalism implies that the remedy need only return a district to the position which would have existed if school boards had behaved neutrally.

The resurrection of the structural approach

After Dayton I, many observers would have said that the Court was well on the road to a position which would soon put an end to most desegregation efforts.[25]

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[24] School District of Omaha v. United States (97 S. Ct. 2905. 1977); Brenan v. Armstrong (97 S. Ct. 2907 1977). In Milwaukee, Minneapolis, Omaha, Austin and Indianapolis hearings were held to measure the "incremental segregative effect" of the unconsititutional school board acts.

[25] For a contrary view, see Taylor (1978).

If a strong intent rule were established, and remedy were reduced to harm caused by these intended efforts, then the litigation of such cases would not be worth the expense. Winning would be more difficult, and even with a victory the plaintiffs could expect a remedy which would produce only minor alterations in school assignment patterns.

The Dayton case was remanded to the trial court for supplemental evidentiary hearings, and Judge Rubin reviewed the entire record. Upon completing this review, he entered a judgment dismissing the complaint. The judge found that, although there were instances of purposeful segregation in the past, the plaintiffs failed to prove that these acts, some of which were over 20 years old, had any current incremental segregative effects. According to the trial judge, the plaintiffs had failed to show either discriminatory purpose or segregative effect, or both, in any of the challenged policies and practices of the Board (446 F. Supp. 1232, 1238, 1241. SD Ohio, 1977).[26]

The appellate court reversed (Brinkman vs. Gilligan 583 F. 2d. 243. 6th Cir. 1978). It concluded that the trial judge had made erroneous findings of fact and had also made errors of law (Id. at 247). The Court of Appeals interpreted the incremental segregative effect language in structural terms: not that each illegal act must be assessed separately as to its incremental effect, but rather that the nature of northern cases is such that segregation is produced through the incremental effects of many actions. The task of the court is to assess the overall impact of such acts. It was in this posture that the case (99 S. CT. 2971), and a companion case from Columbus (Ohio 99 S. CT. 2941. 1974), went to the Supreme Court. The court reversed the trend toward an individual model and adopted the line of argument presented by the trial judge in Columbus. In as much as the school districts in these two cities were intentionally segregated on the basis of race when the Supreme Court decided Brown in 1954, from that time on the school boards have been under an affirmative duty to dismantle the then existing dual school system. In the key portion of the opinion, the Supreme Court held:

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[26] In St. Louis, the trial court wrote a similar opinion, with a similar outcome. Judge Meredith found that the plaintiffs failed to show segregative intent and segregative effect sufficient to justify a finding that the schools were unconstitutionally segregated (F. Supp. 1979). In Austin, Omaha, and Minneapolis, however, upon remand in light of Dayton I, the trial judges found that the systems were segregated, that the defendants failed to carry their burden of showing that the segregation was not district-wide, and they ordered system-wide remedies.

> Where a racially discriminatory school system has been found to exist, Brown II imposes the duty on local school boards to 'effectuate a transition to a racially non-discriminatory school system.' (349 U.S. at 301)...Brown II was a call for the dismantling of well-entrenched dual systems, (and school boards operating such systems were) clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch, Green vs. County School Board (391 U.S. 430, 437-438. 1968)...Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment (47 LW 4926. 1979).

It should be noted that in both cases the Appellate Court found, in addition, that post-Brown conduct in some ways increased segregation in the systems. However, the most reasonable reading of Columbus and Dayton II would be that even if all subsequent action had only perpetuated the segregation existent at the time of Brown, the school boards would be in violation.

The two Ohio opinions once again re-establish a structural model of remedy in the school cases. The remedy focuses upon results. In Columbus, almost one half of the 96,000 students will be reassigned, and in the smaller Dayton school district about 15,000 students will be transported to new schools. Approximate racial balance will be achieved in the great majority of the schools in these systems.

The Court has taken a more structural position on the violation question as well. Indeed, here, the Court has never spoken as firmly. In districts which operated a dual system in the Keys sense in 1954 (and one must presume that nearly every system with more than a few minority students did), the obligation is to act so as to desegregate. Protestations of neutrality in board decisions will apparently fail. The most obvious basis for the claim of neutrality is the neighborhood school, but in the Columbus case, the trial judge stated that "those who rely on it as a defense for unlawful school desegregation fail to recognize the high priority of the constitutional right involved" (429 F. Supp. at 258). And the lower court implied that the adherence to a neighborhood school concept, with knowledge that the predictable effects of such a policy will be segregated schools, is a factor to be considered in determining whether an inference of segregative intent should be drawn (Id. at 255). Proof of a neighborhood school policy is, by this reasoning, evidence of a constitutional violation, not evidence of innocence. Such a position is fundamentally structural. It rejects an analysis based on individual intent to segregate and replaces it with an analysis of the outcome of school decisions within the context of urban residential segregation.

However, the Court has not taken the final step and rejected an individual model of violation: instead it reaffirmed the Keys analysis as the central theory of violation. Once should not believe that this is the last word from the court. If the lase few cases teach any lesson, it is that the area is still in turmoil, and left unresolved are the difficult questions of metropolitanism. But the Keys approach has now withstood several years of assault and appears more firmly entrenched than ever. The Rehnquist-led agenda has failed to stem the tide, and one suspects that if this point of view could not win in Dayton, then there are few places where it could succeed.

In Columbus and Dayton, as in Denver before, there is a basic contradiction in the opinions. In each the Court clings to the de facto-de jure distinction. Thus in a narrow sense, it has remained true to the individual model of violation, insofar as it is based upon the proof of intended acts. Following the presumptions established in Keys, however, these opinions divorce the question of remedy from the stated source of violation, i.e., the intended segregative acts of school boards. It is one thing to say that the consequences of past de jure segregation have a present impact which goes beyond the immediate effects of the segregative decisions. It is another thing to assume that all school segregation today is the result of past school board segregation acts (Dworkin 1977; Yudof, 1978). Not only is such an argument intuitively implausible, it is contradicted by what data we have on housing choices (Farley et al., 1978). Yet in ordering a system-wide remedy designed to balance the school system racially the courts implicitly adopt this latter position.[27] Between the remedy and merit stages, therefore, there is a contradiction in the opinions. While the language of the violation is that of an individual model, the remedies adopt a structural approach.

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[27] This contradiction is not new to Dayton and Columbus. Writing about Swann, Fiss noted: "The net effect of Charolotte-Mecklenberg is to move school desegregation further along the continuum toward a result oriented approach...The predominant concern of the Court in Charlotte-Mecklenberg is in fact the segregated pattern of student attendance, rather than the causal role played by past discriminatory practice...The court made no serious attempt either to determine or even speculate on the degree to which it contributes to present segregation. Nor did the Court attempt to tailor the remedial order to the correction of that portion of the segregation that might reasonably be attributable to past discrimination. The court moved from a) the undisputed existence of past discrimination to b) the possibility or likelihood that the past discrimination played some causal role in producing segregated patterns to c) an order requiring the complete elimination of those patterns. The existence of past discrimination was thus used as a "trigger" --and not for a pistol, but for a cannon. Such a role cannot be defended unless the primary concern of the court is the segregated patterns themselves, rather than the causal relation of past discrimination to them." (Fiss, 1971:704-5). We might say of the second Dayton opinion, however, that the cannon now has a hair trigger.

Given this analysis of the school cases, we are left with two issues. The first by way of a question: Why has the court refused to abandon the individual model of the violation when the general thrust of the remedy certainly speaks to a structural understanding? And the second issue is whether a more structural model of violation can be justified. Let us deal with each question in turn.

Problems and Potentials of a Structural Approach

Why not adopt a fully structural approach?

First, there is a fundamental question about a structural perspective on rights which relates to the role of law itself. As opponents have long noted, it is most certain that we would not wish all of our rights and duties to be determined on the basis of group membership (Graglia, 1976). Freedom of speech, the free exercise of religion, protection against unreasonable searches and seizures, the right to a speedy public trial, the right to vote, etc., are rights which we would not wish to hinge upon our membership in any group. As we would not wish it to be the law that registrars should make rules to ensure that whites and blacks vote in equal proportion in elections, how is it we may wish school boards to make rules causing whites and blacks to go to school together? Is there anything about the Equal Protection Clause which differentiates it from these other Constitutional provisions? Unless there is, there is a danger that a movement toward a totally structural interpretation compromises individual rights.

Second, there is a problem of determining the limits of a structural theory of violation. It would be a mistake to believe that the court is unable to see the problem from a structural perspective; the idea is not new in the legal or the social science literature (Fiss, 1973; Bickell, 1970; Knowles and Prewitt, 1969; Blauner, 1972; Friedman, 1975). Many agree that neutral rules, honestly arrived at, can produce segregative outcomes. Yet a difficulty remains in understanding when we should stop a structural analysis and re-introduce an analysis based on individual action. There is a "slippery slope" quality to the structural approach. It potentially leads to a sociological reductionism, a long term possibility no more attractive than psychological reductions.

Third and most crucial, what remains of the concept of state action under such a theory? The present problem of racial inequality and isolation in public education is the produce of government discrimination, private discrimination, personal choice and individual abilities. School segregation is due partly to the segregative purpose of the school board, but is due partly to residential housing patterns. They in turn are due in part to governmental segregative acts (Forman, 1971), but are due also in part to individual choice (Farley, et al., 1978). Black-white differences in school achievement similarly are due to factors related both to schools and personal background (Coleman, 1966; Jencks, et al., 1972). Partitioning the effects of these various factors is nearly an impossible task.

An individual model of violation does not provide an easy answer to this problem, as witness Dayton I and Dayton II, but a court uncertain of its position is on safer grounds by remaining with the language of intentionality. It is always possible to increase or decrease the scope of the violation by creating or destroying presumptions or shifting a burden of proof. The individual model does not burn any bridges. A structural model, on the other hand, requires a more fundamental and less revocable constitutional step. By looking at results, it conflates these different causes. The school board becomes responsible not only for its own intended wrongdoing, but for tolerating or permitting all forms of racial isolation and inequality in the society that can impact on schools. Such a position is difficult or impossible to justify if there is no way to define the limits of this view of rights. If every unequal outcome raises an equal protection claim the right is unlimited and the remedy unimaginable. To justify a structural view of violation we must have some outlines of the evidence needed to say that some inequality or some isolation is not to be attributed to state action.

Finally, the reluctance of the court to adopt a structural model of violation may, ironically, be related to the problem of justifying a structural model of remedy. When adopting an individual model, the justification of the remedy is most appropriately defined by a backward looking "but-for" test. As the wrong is the intended misdeed of someone (or some group), the remedy is to put people back into the position they would have enjoyed but for the wrongdoing. With a structural interpretation, however, this type of justification cannot suffice. The remedy must be forward looking, designed to achieve new institutional arrangements (Chayes, 1976). The difficulty confronting the court is, simply, that it has not been demonstrated that successful remedies exist. The failure of the educational harm theory of strict liability is a case in point. In many lower courts, and implicitly in Keys, this legal theory has been rejected, at least in part because there is no persuasive evidence that any remedy the courts were prepared to order could in fact cure the problem. Evaluations of school desegregation do not indicate the large positive effects that once were expected in terms of achievement gains and increased self esteem of minority students (Weinberg, 1975; Stephan, 1978; St. John, 1975; Cohen, 1975; Epps, 1975).[28]

Given these four reasons for the Court's refusal to move toward a structural understanding of violation we may turn to the second question. Can we overcome the objections and justify a structural approach?

Justifying a Structural Approach

One may argue that it is possible to distinguish the Equal Protection Clause from other rights because the Clause is protecting what we might call "contingent rights." In an admirable essay, Hart makes the observation that the "right" to certain excuses in the criminal law (and indeed invalidating conditions in civil transactions) may be of no use to individuals whose economic or social position is such that the difference between a law of strict liability and a law that recognizes excusing conditions is of no importance.

> If starvation forces him to steal, the values the system respects and incorporates in excusing conditions are nothing to him. This is of course similar to the claim often made that the freedom that political democracy of the Western type offers to its subjects is merely formal freedom, not real freedom, and leaves one free to starve. (Hart, 1968: 50-51)

Hart is noting that some rights are "contingent" upon other factors if they are to be enjoyed. They are not solely a matter of personal choice and individual ability. While all rights may to some extent be contingent, there are degrees of contingency. The values of structural integration and equality embodied in the Equal Protection Clause are values which are highly contingent upon the structural arrangement of institutions. For instance, the right to equal educational opportunity is contingent upon access to equal educational facilities, to a standard of financial and housing sustenance that permits school attendance and concentrated study, etc. These structural factors impinge upon a person's ability to take advantage of his "rights".

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[28] This is not to say that desegregation has failed as a remedy for such harm, but that desegregation plans such as "the courts were prepared to order" have not cured the problem. This issue is addressed in more detail in Chapter 15 of this report. There we argue that only a more structurally-oriented approach to remedy, based at least partly on a conflict analysis of schools and racial inequality, can make a real difference.

We may better understand this category of rights using Rawls' perspective on social justice (1971). Rawls distinguishes two principles of justice, "lexically ordered".[29] The first principle deals with liberties, including liberty of conscience and freedom of the person, as well as the liberties involved in the participation in political affairs. The second principle deals with social and economic inequalities. While it is not always clear whether some rights, or principle of justice, falls within the first or second principle, we can in general allocate values in this fashion. Free speech certainly falls within the first principle. A right to a minimum wage falls within the second principle. The values implicit in the school cases, community and equality, fall basically within the second principle, since they involve social and economic isolation and inequality.

The argument advanced in lexical ordering is that the rights and values falling within the second principle may be understood and dealt with as structural problems, often affecting groups of citizens, without unduly threatening the rights and values expressed in the first principle. Indeed, to equate the two sets of principles such that we always treat both from an individual perspective, not only limits our abilities to achieve the ends expressed in the second principle, but by doing so, seriously erodes the equal worth of the value of liberty.

A second problem involved in justifying a structural approach focusses on evidence and proof.[30] In adopting a structural perspective on the violation we must admit that it may be impossible to partition precisely causes of the present isolation and inequality of black Americans. Personal choice, personal prejudice, unintentional discrimination and institutional arrangements (racism) constantly interact to perpetuate our present circumstances. Moreover, the problem of violation can not be defined narrowly, in terms of the immediate isolation or achievement of particular students. From a structural view, the suit, first and foremost, is about the position of blacks and other minorities in society, not the immediate situation of individual school children. Likewise, it is about the organization of schooling, not the sins of past board members or administrators. From this perspective, the key evidentiary issues can no more be stated in individual terms for plaintiffs than they can be for defendants. The definition and limits of the cases must be structural and distributional for all parties (Brickman, et al., 1980).

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[29] By "lexical order", Rawls means that the rights defined by the first principle must not be traded for rights defined by the second principle. Thus equal liberty is not traded for greater equality in social welfare (See Rawls, 1971, sections 8, 11, 14, 196).

[30] In discussing the evidentiary problems involved in a structural approach, we should not contrast this with some ideal of how easy proof is under an individual model. Evidence proving intention is at best elusive (Eisenberg, 1977; Simon, 1978; Mote, 1976; Perry, 1977). Moreover, the presumptions of a dual school system, and the justifications for shifting the burden of proof, have become more and more tenuous. In its most recent opinions, the Supreme Court has dealt with the very difficult problem of partitioning between institutional and personal causes of segregation raised in Dayton I, by sweeping them under the rug in Dayton II and Columbus (See Mr. Justice Renquist's dissent in the Columbus case).

This does not mean, however, that we cannot make distinctions, or that once adopted, a structural model commits the courts forever to a group-oriented jurisprudence, or that everything that calls itself a group must be treated as such. While it is difficult to formulate specific criteria in advance of ajudications, the general outlines of appropriate limits can be stated. There is not a better starting place than the language in the famous footnote in the Carolene Products Case (304 U.S. 114 at 152. 1938). Here, Justice Stone noted that while the general presumption of constitutionality of legislative decisions is to be measured by the existence of some rational basis of judgment within the knowledge and experience of the legislature, less judical leeway may be given to certain types of legislative actions. Specifically Justice Stone suggested that:

> ...prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry.

The key concept in this passage is that of a discrete and insular minority. While the term is certainly imprecise, we can give it meaning within the context of the value pursued through the Equal Protection Clause: the structural integration of Americans. From this value premise, black Americans constitute a discrete and insular minority. Polish, or Italian, or German, or even Japanese Americans do not. The difference between these latter groups and blacks may be defined in terms of their degree of structural integration: in terms of educational attainment, occupations, income and residential location the latter groups are within the mainstream of our society (Burkey, 1978).

Evidence as to insularity helps both to define the occasions for a structural understanding of violation and to establish the limits of this interpretation. Some of the groups mentioned above were once, by the criteria stated, discrete and insular minorities themselves. The change in their position, and the gulf between their current position and that of black Americans can be demonstrated. We should not suggest that such an analysis will be easy, and as in all such matters it is difficult to draw the line, but the relevant criteria are not unknowable, and the analysis would remove us from entangling judicial fictions - as well as tendentious remedies.

Finally, to justify a structural approach to the Equal Protection Clause we must justify the remedy. Surprisingly, this is the most difficult task of all. From one point of view, one of the most striking aspects of the school cases is the extent to which the tail has wagged the dog. On ocassion, it would appear that courts have determined the nature of the remedy and then gone about the business of constructing a violation argument which could support the judgment. The Court has consistently altered presumptions and burdens so that the "findings" might support the outcome. The courts have demanded that school boards adopt remedies which promise realistically to work, and to work now. Yet in several respects the remedies have not worked. According to the most optimistic reports, they have had only a marginal positive effect upon the educational achievement of black students (Crain and Mahard, 1978). In large cities they have occasionally proved to be self-defeating, due to the departure of white children from the school system (Rossell, 1978). A failure for the remedy to produce results seriously undermines the structural approach.

One thing which both an individual and a structural approach to violation share is that old legal maxim, "ought implies can". From a structural perspective, this must mean that it is possible to reorganize the social organization of schooling so as to move the society in the direction of greater community and equality between black and white students. If this is impossible, the structural interpretation of violation cannot be justified. In such matters, of course, impossibility is a relative term. A dictatorship could compel the values under consideration through brute force. It could assign people residences, jobs, schools, churches, in such a way as to insure equality and community, but at a cost few would wish to pay. Thus the "impossibility" is defined by the limits imposed by other values of equal or greater importance, many of which are included in Rawls' first principle of justice. Some critics of school desegregation efforts have premised their disagreement upon an argument that present efforts are not working (Edmonds, 1974; Glazer, 1972; Armor, 1972). It may be that these critics are correct, that the remedy is impossible; but before arriving at such a conclusion we should reflect upon the extent to which indeed the dog has wagged the tail. By failing to connect a structural view of violation and a structural view of remedy, the individual approach to violation has narrowed and confined the remedies thus far pursued.

The individual model has restricted remedy in three critical ways. First is the limitation imposed by Milliken vs. Bradley. By requiring proof of intention of each school district, and by refusing to allow the use of data on systematic housing segregation in metropolitan areas, the courts have made desegregation of large metropolitan areas a virtual impossibility. A structural analysis would allow a successful metropolitan suit if plaintiffs can show that the demographics of urban areas have systematically restricted blacks to certain areas of the metropolis. Indeed the cross-district remedy is central if we are to achieve one key purpose of the Equal Protection Clause: the creation of one community.

The second way the individual model has restricted remedy is by focusing almost all effort on racial balancing, while devoting little effort to improving educational equality. The latter strategy looks suspiciously like legislation, rather than redress of a particular wrongdoing (Chayes, 1976). The first tentative steps in dealing with these issues occurred in Milliken II (Milliken vs. Bradley, 433 U.S. 276. 1977), in which the Supreme Court upheld a variety of "educational components" in Judge DeMascio's remedy order.[31] While this particular set of components may not achieve the desired results, the case opens up a wide variety of possibilities beyond racial balancing. In Chapter 1 we discussed some of the community, organizational and classroom structures which must be altered if desegregation is to be more successful.

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[31] These included 1) remedial reading and communication skills program, 2) the creation of five vocational education centers in areas such as construction trades, transportation and health services, 3) two technical high schools focusing on a business curriculum, 4) a uniform Code of Conduct, 5) a Community Relations program, 6) an inservice training program for the instructional staff, 7) a testing program to insure no discriminatory testing procedures, 8) a counseling and career guidance program, 9) inclusion of multi-ethnic studies in the curriculum, and 10) plans for Co-curricular activities with other artistic and educational institutions (Levin, 1978).

A third major roadblock to the agenda of structural reform of school systems is the inability or unwillingness of both federal judges and plaintiff attorneys to view the case as a structural problem at the end of the litigative phase.[32] In the typical case, the attorney is involved in the remedy only until an original plan is put in place. Subsequent involvement is contingent upon active complaints by individuals who feel aggrieved. Then the problem is treated typically as a grievance would be in a labor relations case; a problem [illegible] a given individual or groupsof individuals which can be ironed out. Rarely do the plaintiff lawyers adopt a more structural posture toward an ongoing remedy. Most judges prefer that the school district draw up a desegregation plan. There are good reasons behind such a practice. A school board and school administration which draws up a plan "owns" it in a way they will never own a plan drawn by plaintiffs or a third party expert. After the plan is in place, however, a federal judge is usually anxious to be rid of a case which may already have been on his docket for years. The judge of course receives annual reports from the school system about the status of the plan, and these reports generally focus upon the degree to which the district is in compliance with the original remedy. If the remedy is primarily concerned with racial balance, so is the report.

All of this is in part premised upon the belief by the federal judge, and the plaintiff attorneys, that they should leave as much of the remedy as they can to the board and administration, because these groups are the experts on how to run a school system. In some sense this is certainly true.[33] Yet it might strike one as odd that an organization which has just been declared in violation of the Constitution because of its past pattern and practices of segregation is now given the task of providing integrated, quality education with little supervision (Monti, 1979). The alternative, suggested by Fiss, is much deeper judicial involvement in the remedy process.

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[32] These issues, and judges' perceptions of their options are discussed in greater detail in Chapter 15 of this report.

[33] Although a conflict analysis, as presented in Chapter 1, would question the group interests served by such professional expertise.

> The remedial phase in structural litigation is far from episodic. It has a beginning, maybe a middle, but no end—well almost no end. It involves a long, continuous relationship between the judge and the institution; it is concerned not with the enforcement of a remedy already given, but with the giving or shaping of the remedy itself. The task is not to declare who is right or who is wrong, not to calculate the amount of damages or to formulate a decree designed to stop some discrete act. The task is to remove the condition that threatens the constitutional values...the remedy involves the court in nothing less than the reorganization of an ongoing institution, so as to remove the threat it poses to constitutional values. The court's jurisdiction will last as long as the threat persists (Fiss, 1979: 27-28).

This is a task which some (including many judges) say the courts are ill-trained and ill-equipped to undertake. The use of a master can certainly help in this effort, but the judge must adopt an "architectural relationship" to the school organization. That is what 25 years of litigation have taught, that is what a structural solution requires. That is what is needed to fulfill the mandate of Brown and the values underlying the 14th Amendment.

CHAPTER 3: SOCIAL SCIENTIFIC EVIDENCE IN THE SCHOOL DESEGREGATION CASES

The mobilization of various groups to alter the state of racial relations in America took many forms after World War II. Experiments with desegregation of the military, expansion and migration of an increasingly industrialized labor force, and acquaintance with international public opinion were some of the factors generating a national movement to challenge racism. Among the many forms this challenge took throughout America's political and economic life, was a legal effort. As a consequence of their exclusion from normal legislative channels, and from access to executive redress, blacks sought to improve their situation through the judiciary. Thus, the NAACP, as the largest and best organized civil rights agency of its time, coordinated and led a growing legal attack on segregation in public facilities and services. The schools were a natural target of this approach: they are a public facility; they are the repository of a sacred resource - children; they are responsible for transmitting-in word and deed-our national moral commitment; and they often are seen as the means to social and economic mobility.

The early school cases, and the transition to Brown, et al., is well described in many sources, most notably and dramatically in Kluger (1975). In the process of constructing legal arguments and strategies for these cases (and the ways in which they could enlighten or convince the judiciary of structural racial discrimination in American life), the NAACP staff began to consider involving leading scholars and intellectuals in their efforts.

The use of social scientific methods and evidence in litigation was not new with the school desegregation cases. In fact the "Brandeis briefs" as they were called, had been introduced years before, in cases focusing on social welfare litigation. Moreover, the direct use of social scientific testimony in school cases began in Sweatt vs Painter (1950), a case brought by the NAACP on behalf of a black student desiring admittance to the all-white University of Texas law school. Robert Redfield, then-chair of anthropology at the University of Chicago, appeared for the NAACP, testifying that state-imposed racial separation was both scientifically unjustifiable and socially destructive.

But the large scale and much more controversial entry of social scientists into school litigation awaited the Brown, et al., cases and the NAACP's development of a litigative strategy that required new legal theory and new evidence. In the 1940's, NAACP attorneys had brought school cases to the court on the argument that segregated southern graduate schools and law schools were not equal. Evidence of inequality in facilities, staff credentials, curriculum, funding, transportation, etc., led to judgments requiring states to begin the process of equalizing their separated facilities. Within the NAACP, however, an alternative plan for attacking America's racially segregated schools began to develop. It was decided to attack segregated facilities directly, on the basis that their very existence was unconstitutional-an inherent inequality before the law. It seemed to some of the lawyers that social scientists might prove useful in this endeavor, and they searched about for appropriate, useful and willing witnesses.[1] The most important find was Kenneth Clark, a professor at CUNY.

Connecting the Scholars

Professor Clark, the most central social science figure in Brown, reports the beginning of his and social scientists' involvement in the school desegregation cases as follows:[2]

> In February of 1951, Robert Carter, an assistant to Thurgood Marshall, at the Legal Defense and Education Fund, approached Clark with an offer that Clark said later "would change my life". Carter said they wanted to make a challenge to the legal doctrine involved in Plessy. They did not want any longer to argue merely that separate educational facilities were unequal, but that the concept of separate educational facilities itself led to inequality. The lawyers' task was to demonstrate subtle or psychological damage to black youngsters from segregation. Was it possible for psychologists to show such damage or harm?

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[1] Over the years, leadership of efforts to utilize social scientific evidence in court, as leadership of the entire litigative strategy, rested in the hands of a relatively small group of lawyers. Robert Carter, Thurgood Marshall, James Nabrit, Tom Atkins, Louis Lucas, Paul Dimond, Jack Greenberg, Norman Chachkin, Nathaniel Jones, William Taylor, Peter Flannery and Julius Chambers tutored new attorneys and shared the mantle of leadership broadly. At the same time, they maintained their involvement and leadership as they moved back and forth among core agencies. Members of this group served with the NAACP, the Legal Defense and Education Fund, the U.S. Department of Justice, the Lawyers Committee for Civil Rights Under Law, the Harvard Center for Law and Education, etc. They taught, conducted legal research, tried cases, and wrote articles and books. While several early members of this group have moved to other roles, others continue to work in this area.

[2] Notes from a presentation Professor Clark made at the 1979 meeting of the Society for the Psychological Study of Social Issues, New York City, September, 1979.

> When Clark asked Carter why he had approached him, Carter replied that he had first approached Otto Klineberg, who had worked with the NAACP before, and then Gordon Allport. Klineberg had informed Carter of Clark's work with the Mid-Century Conference on Youth, at which Clark presented materials on "Prejudice's Effects on the Personality of Minority Youth". Clark shared that report with Carter and said if that kind of material helped, then maybe he could help.

At a subsequent meeting between Carter, Clark and Thurgood Marshall the following was agreed upon:

1. The facts in Clark's report were relevant to the issues the NAACP wanted to focus on - harm.
2. These facts needed to be presented as expert testimony in trial.
3. Clark needed to interview plaintiff children to test his report on these people in the specific locales undergoing litigation.
4. Clark's help was needed to identify and reach and involve other social scientists.

The list of those scholars who testified for the plaintiffs in the Brown, et al., cases reads as a listing of the most prominent social-psychologists of the day. . .and as the forefathers of an applied or activist tradition to this day. Most were represented in the founding of SPSSI - The Society for the Psychological Study of Social Issues. The Society's Journal, the Journal of Social Issues, supported and printed several reports and studies associated with problems of race relations and social changes.[3]

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[3] Most notably, in this context, was Clark's report on the process by which social scientists became involved in these cases, and the roles they played (1953). The scholars involved for the plaintiffs in the Brown, et al. cases included: (1) in the Clarendon, S.C.,case: Kenneth Clark, David Krech, Helen Traeger; (2) in the Topeka,Kansas, case: Louise Holt, Horace English, Wilbur Brookover, John Kane, Bettie Belk; (3) in the Prince Edward, VA., case: Merril Brewster Smith, Isadore Chein, Kenneth Clark, Horace English, Alfred M. Lee, Mamie Clark; (4) in the Delaware case: Otto Klineberg, George Lane, Kenneth Morland, Frederick Parker, Jerome Bruner, Kenneth Clark, Frederick Wertham. Testifying for the defense in the Virginia case were: Henry Garrett, William Kelly and John Buck.

Clark reported that he also worked with several LDEF lawyers to prepare aspects of scientific evidence from trial to apellate level, and to help the lawyers prepare for cross-examination of opposing witnesses. One of the opposing witnesses, Henry Garrett, appeared for the defense in the Virginia case. Clark reported that he and Isadore Chein met several times with Garrett, in order to try to convince him he was in error and to disuade him from testifying. Clark feared that when presented with contradictory social scientific testimony, the Supreme Court would be forced to decide which social scientific testimony it would accept.

Clark thought his role was over after the trial courts acted. But Marshall said he wanted Clark to continue to attend the lawyers' meetings. Clark then played a further role in summarizing the social scientific testimony. When he discovered that his summary would be used as an appendix to the legal brief to the Supreme Court, he insisted that other social scientists be involved to help critique and polish the draft of the summary. Isadore Chein, Stuart Cook and Gerhart Saenger helped prepare the report and shared it with other social scientists, mostly social psychologists available in the New York area.

Marshall and Carter assigned J. Weinstein and J. Nabrit to work with Clark in writing the final brief. The scientists made suggestions affecting the social scientific quality of the legal brief. Clark reported that he did not accept or reject anything without consulting with Cook and Chein. When the lawyers and social scientists agreed, they decided to seek endorsement by Clark, Cook, Chein and twenty-nine other prominent scholars.

The central argument of the brief may be summarized as follows:[4]

1) Existing differences among racial groups are explained by environmental factors.

2) A key environmental difference between white and black children is the imposition of state mandated segregated schools.

3) Minority children learn inferiority from segregation. They suffer a loss of personal dignity, a depression of educational aspiration, and an impairment of academic ability.

4) Under the proper circumstances,desegregation will lead to more favorable attitudes, improved race relations, and academic gains for minorities.

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[4] The entire brief, the social science Appendix in the Brown cases, is printed in the Minnesota Law Review (1953).

Perhaps an excerpt from this appendix will provide a flavor of the argument:

> On the basis of this general fund of knowledge, it seems likely that feelings of inferiority and doubts about personal worth are attributable to living in an underprivileged environment only insofar as the latter is itself perceived as an indicator of low social status and as a symbol of inferiority. In other words, one of the important determinants in producing such feelings is the awareness of social status difference. While there are many other factors that serve as reminders of the differences in social status, there can be little doubt that the fact of enforced segregation is a major factor.
>
> This seems to be true for the following reasons among others: (1) because enforced segregation results from the decision of the majority group without the consent of the segregated and is commonly so perceived: and (2) because historically segregation patterns in the United States were developed on the assumption of the inferiority of the segregated.
>
> In addition, enforced segregation gives official recognition and sanction to these other factors of the social complex, and thereby enhances the effects of the latter in creating the awareness of social status differences and feelings of inferiority. The child who, for example, is compelled to attend a segregated school may be able to cope with ordinary expressions of prejudice by regarding the prejudiced person as evil or misguided: but he cannot readily cope with symbols of authority, the full force of the authority of the State-the school or the school board, in this instance-in the same manner. Given both the ordinary expression of prejudice and the school's policy of segregation, the former takes on greater force and seemingly becomes an official expression of the latter (1953:432-433).

Reactions to the social science brief were immediate and vigorous; they presaged a series of reactions that have continued to surround the presentation of social scientific testimony in the desegregation cases to this day. Some lawyers and judges have argued against social science involvement on the basis that what is at stake in school desegregation is a constitutional guarantee, a moral principle. As such, it should not rest on public opinion polls, attitude studies or something as ephemoral as the current fads and fashions of social science. In delivering this sort of critique to the social science input into the Brown cases, Cahn wrote:

> In the months since the utterance of the Brown and Bolling opinions, the impression has grown that the outcome, either entirely or in part major, was caused by the testimony and opinions of the scientists, and a genuine danger has arisen that even lawyers and judges may begin to entertain this belief.

> The word 'danger' is used advisedly, because I would not have the constitutional rights of Negroes - or of other Americans - rest on any such flimsy foundation as some of the scientific demonstrations in these records (1955:157-158).

A second set of critiques, mainly from legal scholars, focused on the technical, jargonistic and often tendentious nature of social scientific evidence. Perhaps it was not merely jargon that was at stake, but the tendency for jargon to translate the everyday into the obscure. Moreover, Cahn charged that the social science was nothing more than common sense, and added nothing new to judicial knowledge:

> For at least 20 years, hardly any cultivated person has questioned that segregation is cruel to Negro school children. The cruelty is obvious and evident. Fortunately, it is so very obvious that the Justices of the Supreme Court could see it and act on it even after reading the labored attempts by plaintiffs' experts to demonstrate it 'scientifically'. When scientists set out to prove a fact that most of mankind acknowledges, they may provide a rather bizarre spectacle (1955:159).

Cahn clearly overstated the case in this regard. Indeed, if he was right about the wisdom of cultivated people there would have been no need for the Brown cases to exist at all; all those cultivated people would have remedied the obvious cruelty long ago. Whether social science is the right tool or not remains a good question, but to argue that "most of mankind" was already convinced of the cause of racial equity is an exaggeration. In fact, many of those "cultivated" people in positions of authority continued to resist the changes mandated by the school desegregation cases for several years.

A third line of critique to the social science evidence in Brown came from social scientists themselves; from other scholars who disagreed with the substantive findings or methods of the studies used in these cases. For instance, challenges were made to the opinion survey of scientists as representing anything very valid (based on problems of sampling, question clarity and specificity, etc.). Moreover, some suggested that Clark's evidence hardly proved the point argued in the brief, on two grounds: (1) the children's choice of a doll of a different color was not adequate or conclusive evidence of psychological harm, because it allowed varying interpretations according to the observer. To demonstrate harm required standardized and conventional measures of dysfunction or maladjustment. (2) Even if harm was demonstrated, it was not at all clear how school segregation, apart from other forms of segregation and discrimination in the society, could be identified as the culprit. In fact, van den Haag went so far as to argue:

> . . .the only thing that Professor Clark has proved is that if there is damage, it is not due to school segregation (1960:77).

Other scholars argued that there was no such harm, or that desegregation could only exacerbate existing inequalities and cause further harm.[5]

A further argument against social science involvement came from a more traditional wing of social science; various leaders of the profession argued that social scientific involvement in public policy making threatened the very basis of science itself. These critiques are discussed in more detail in Chapter 4. Although they are relevant and influential critiques, they are much broader in nature and scope than the school desegregation cases, per se.

These general controversies about the nature and use of social scientific evidence in the school desegregation cases did not abate with the continuation of litigation and expert testimony. In fact, they have continued to this day, appearing in one forum or another, from time to time. However, just as the critiques have continued, so has the presentation of scientific testimony in court.

Twenty-five years later a group of social scientists once again submitted a brief to the Supreme Court, this time as an appendix to the Columbus and Dayton cases. The central arguments of the Columbus brief bear small resemblance to those in Brown. It argued:[6]

1) Residential segregation is widespread and attributable "in important measure to actions of public officials, including school boards".
2) School segregation and residential segregation are interdependent.

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[5] This line of argument basically attacked the contact hypothesis underlying the optimism of the Brown appendix. According to that hypothesis, social contacts in school can reduce prejudice and other harms of segregation if the contact is amongst equals. The critics argued, for a variety of reasons, that contacts would not be between equals and therefore, would not necessarily reduce white prejudice nor reduce psychological harm and academic inequality. While it is difficult to attribute admirable motives or values to those advancing this line of argument, their implicit predictions about the "benefits" of physical desegregation were probably more realistic than those of plaintiff experts (see Stephan, 1978). Of course, part of the difference is that the social structure of contacts did remain the same, and many of the suggestions made in the brief to alter these structures were not included in court orders, or in later implementation efforts.

6. Social Science and Residential Segregation: A Social Science Statement (1979). Appendix to the Plaintiff's brief, Penick v. School System of Columbus, Ohio.

3) In several ways school segregation has maintained or increased residential segregation, both immediately by causing people to migrate in certain patterns, and in the longer run by maintaining prejudicial attitudes which reduce tolerance for integrated neighborhoods.

An excerpt from this appendix also follows:

> Residential segregation between white and black Americans and other racial and ethnic minorities prevails in all large cities in the United States. This segregation is attributable in important measure to the actions of public officials, including school authorities.
>
> Education is a pervasive governmentally organized activity that reaches into every community. The institutionalization of racially discriminatory practices throughout the public school system is a substantial cause as well as effect of society's other racial practices. Society's major institution for socializing the young, aside from the family, is the public school system. Most children are greatly influenced by their school experiences, not simply in formal academic learning but in developing a sense of self and knowledge and feelings about social life and behavior.
>
> The actions of school officials are part of a set of discriminatory actions by government agencies, and other institutions. This web of institutional discrimination is the basic cause of school and residential segregation. Economic factors and personal choice are often considered as additional causes (1979:3a, 7a, 13a).

Not only are the arguments quite different, so are the authors and signers. Of the thirty-two signers of the Brown brief, twenty were rather clearly identifiable as psychologists or social psychologists, and nine were sociologists or anthropologists. Of the thirty-eight signers of the Penick brief, nineteen are identifiable primarily as sociologists, three as political scientists and two as educational scientists. Only six are clearly psychologists or social psychologists. These disciplinary differences also are reflected in the contents of the brief. The first is fundamentally composed of arguments concerning the effects of segregation and desegregation on the psychological and cognitive well-being of school children. The second speaks of such matters only in passing. It is, primarily, a document concerning the effects of social and demographic patterns on institutional arrangements in the society.

The differences in the two documents reflect a dramatic change over twenty-five years in the legal issues at stake, and in resultant scientific issues, data bases, and methods. Thus, to speak of social science evidence in school cases involves a changing landscape, and a wide variety of materials. In the following pages we briefly map out some of the outstanding elements and changes in social scientific evidence over these twenty-five years. This chapter, therefore, is a companion to Chapter 2; together they should provide the reader with a general overview of the history of social science in school desegregation cases.

Twenty-five Years of Testimony

The social science evidence in Brown was, of course, primarily directed toward the legacy of Plessey vs Ferguson, and its "separate but equal" doctrine. Starting with the premise that state mandated segregation was hardly neutral vis a vis race, but rather was enacted with some racist animus, social scientists attempted to demonstrate: (a) segregation caused measurable psychological and academic harm, with the implicit agenda that; (b) this harm would not be overcome by producing only "equal" physical facilities for white and black children. It advanced the argument that differences in achievement between black and white children would be largely eliminated once this cause was eliminated, and the promise that there were ways to desegregate schools to bring about this result (loosely defined as the contact hypothesis).

One might have expected that in ensuing years social scientists would refine their measurement of harm, construct the causal connection between school segregation and the alleged harms, and refine their understanding of how interracial contacts could produce (or fail to produce) equal education. Relatively little of this occurred, and even less found its way into the courtroom. Why?

First, there was the Brown opinion itself. In declaring segregated schools inherently "unequal" it made the harm data superfluous for plaintiffs in Southern cases. To prove state mandated segregation was to win on the merits. Second, counterattacks by opposing experts such as van den Haag and Garrett, suggesting deleterious effects of integration, were legally ineffective and eventually declared inadmissable as irrelevant (Stell vs Savannah Board of Education 318 F. 2d. 424 - 5th Cir., 1963). That segregated schools harmed blacks became a "legal fact", part of common sense judicial wisdom, not to be controverted by opposing "evidence." Finally, so very little desegregation was occurring that there was no real occasion to be concerned with the validity of the contact hypothesis or its applicability to desegregated schools. In 1963-64, ten years after Brown, only 1.2% of the black students in southern districts were attending desegregated schools (Weinberg, 1977). The key issue in Green and Swann was not whether there was harm (which was no longer the court's question), nor whether there were gains from desegregation, but simply whether the courts would reject the tokanism of "freedom of choice" and come to grips with the demographic realities precluding substancial desegregation based upon a neighborhood school system. In short, the focus shifted from violation to remedy.

Eventually, the plaintiffs employed a number of expert plan writers to address these issues of remedy.[7] Their primary task was to come up with plans which would desegregate schools. Although plaintiffs concentrated on between-school desegregation, they also opposed rigid tracking systems, IQ tests to group minority children, and other pedagogical techniques which resulted in racial segregation within desegregated schools (e.g. Moses vs Washington Parish School Board 330 F. Supp. 1340 E.D., LA, 1971). But they devoted relatively little effort to defining and describing positive school building or classroom experiences that might improve the quality of desegregated education for students. The educational changes needed to improve the academic achievement and psychological or social well-being of minority or majority youth did not appear to be a major issue in constructing remedies.[8]

The early northern cases might have opened up a new opportunity for psychological harm data, and indeed, plaintiffs tried this line of attack. The argument was that segregated schools produced harms of an educational and psychological nature, and that these harms existed regardless of whether segregation was state imposed or the product of a neighborhood school system in a residentially separate community. As noted in Chapter 2, however, the courts rejected this line of argument in a relatively summary fashion; primarily for reasons beyond the purview of social science data.

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[7] The most prominent plan writers employed by plaintiffs were Gordon Foster and Michael Stollee. Others, working variously for plaintiffs, defendants and judges have included John Finger, Larry Hughes, David Gordon, Larry Hillman, officials at many Title IV Desegregation Assistance Centers, etc.

[8] Why? Perhaps this was beyond the limits of the expertise of plaintiff lawyers and their experts. Perhaps they felt they gained enough when they gained the order to desegregate. And perhaps they trusted school officials to solve this problem once desegregation actually had occurred. Certainly the courts elected to back-off from this level of planning for change, and to leave it to educational professionals. Once again, the adoption of a consensus model of implementation in the midst of a conflict model of controversy settlement appeared to be at work. We return to a discussion of these issues in Chapter 15.

While plaintiffs could easily demonstrate educational inequalities (e.g. test score differences), they could not easily attribute these to school segregation, per se. Indeed the most serious scientific effort of the time to generate data to "prove" the school's role in racial inequality and harm turned out to be a two-edged sword.

Pursuant to the 1964 Civil Rights Act, the Office of Education commissioned a study of educational quality in the U.S., apparently with the purposes of showing great inequality, and thus justifying a larger federal role in education and educational change. The product, commonly known as the Coleman report, produced results which seemed to cut both ways in the harm argument (Coleman et al., 1966). Helpful to the plaintiff cause was the finding that black students in mixed race schools did better academically than black students in segregated schools (almost none of these schools were desegregated by court order, but rather were "naturally" desegregated). But several other findings made these data less helpful to plaintiffs. First, the absolute differences in school facilities were not nearly as great as had been anticipated. Second, the differences which did exist in achievement were attributed more to the family background and peer group associations of the child than to the school itself. Third, flowing from the above, most of the academic differences between segregated and desegregated schools could be explained by class-mix rather than race-mix. That is, gains for lower class blacks (and lower class whites) came from going to school with middle class children (whether white or black), not white children, per se.

The interpretations of the Coleman report most favorable to plaintiffs were: (a) large inequalities in student achievement still existed (especially in segregated systems); and (b) desegregated schools led to some diminution of achievement inequalities (as measured by standard tests) between white and black students. On the other hand, the most damaging interpretations were: (a) facilities in segregated schools were not dramatically inferior to facilities in other schools; (b) the difference in achievement were produced largely by factors beyond the immediate controls of school officials (e.g. family background); and (c) the gain of racial desegregation, per se (e.g., without class desegregation), would not be great.[9]

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[9] The methodological and substantive critiques of the Coleman report, and responses, are voluminous. A good starting place is Mosteller and Moynihan (1972).

While the Coleman data was used by plaintiffs in Denver (Coleman himself testified) and Detroit, it shortly dropped out of the cases, as defendant groups became aware of its vulnerability.[10] More importantly, Dr. Coleman and other authors fairly soon refused to testify from the data in support of school desegregation. However, a secondary analysis of the Coleman data was produced by the U.S. Commission on Civil Rights (Racial Isolation in the Public Schools, 1967). This report stressed certain aspects of the original report, and provided more fuel for scientific and litigative controversy. It simultaneously confused and challenged the murky mixture of race and class factors in student achievement scores, and generally affirmed the Commission's vigorous support for the desegregation effort. Several of the key scholars involved in this report, and in other re-analyses and extensions of the Coleman data, continued to testify in support of school desegregation.

While much of the content of the Colemena report followed in the footsteps of earlier harm arguments, the study was radically different in method and scope. The data came from questionnaires administered to principals, teachers and students from a large sample of schools in the U.S. (over 2000 elementary and 600 high schools), and were analyzed using multiple regression techniques. The movement toward a more macro and more quantitative sociology in desegregation cases had several important consequences. First, the intellectual and technical tasks facing a lawyer wishing to use such data, and a social science expert wishing to present it, is considerable. The logic of the analyses and interpretations of results require training which few lawyers and judges possessed in advance of trial. The expert cannot simply present results; he or she must expend considerable effort explaining how they were achieved, and indeed what they mean. Given the relative inaccessability of the findings, there is the potential for increased confusion and obfuscation by witnesses and counsel.

Beyond the difficulty of communicating these findings, there is the further problem of the limits of the method. Like all such massive studies, the Coleman report could only use as variables those things which were relatively objective and open to measurement. The report could measure standard test scores, the number of students in a class, or the number of books in a high school library. It could not easily measure the nature of student-teacher classroom interactions or those aspects of learning not tapped by standardized testing. Thus, while the sample of school systems, and by implication school children, in the Coleman data, was far superior to anything done in the Brown cases, the "sample" of variables may have been no better, or indeed even inferior. In fact, if we read Brown to say it is the intangible and subtle processes of education which are most withheld by segregation, then the Coleman report type data is a move away from the key harm issues in school desegregation.

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[10] At first, defendant groups had a difficult time obtaining the raw data from the government and then finding individuals who would do an anaylysis from their point of view. From the shadows of our interviews, comes a story of a midnight raid by a defense group, who over the course of a weekend, took, copied and replaced the Coleman Report data tapes from the offices of one of the researchers on the staff of the project.

With hindsight, we can see that the Coleman report constituted a watershed for academic opinion concerning school desegregation. Until the Coleman report, the traditional wisdom in social sciences was that schools caused a large part of the difference in white-black performance, and that schools could be used to reduce these differences dramatically. By casting doubt on both assumptions, the Coleman data eventually led to a split in the academic community. For reasons discussed elsewhere in this report (Chapters 6 & 9), this did not lead immediately to competing social science testimony. It did, however, lead to disputes in the academic literature and broke the nearly united front social science had presented on school desegregation. The divisions within the academic community were widened as measurement of the effects of desegregation became a major area of academic interest. One significant controversy took shape around David Armor's study of a voluntary desegregation plan in the Boston area. While the METCO study does not stand as the best of its type, it does stand as an exemplar of controversy and division in the social sciences on these issues. Armor's initial article "The Evidence of Busing" (1972), which indicated little or no gains in academic performance, was met with particularly harsh response from Thomas Pettigrew and his colleagues (1973), and with an equally harsh rejoinder from Armor (1973).[11] Subsequently, there has been a long line of research producing studies indicating both positive and some negative academic consequences of desegregation. Comparing the many studies is a difficult task at best, but the weight of the evidence would appear to be that desegregation as currently undertaken has minimal positive effects on the academic performance of black or white children.[12] Relatively little of this data, however, ever made it into the courtroom. Given the findings, the plaintiffs had no occasion to present it, preferring to use other arguments such as minority gains in future academic or employment opportunities. The defendants could find few social scientists willing to say in court that desegregation would not help achievement, and few judges willing to permit it to be said.[13] As harm arguments faded, demographic arguments grew to fill the void.

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[11] Examples of this exchange are presented in Chapter 6.

If Kenneth Clark represented the first wave of academic involvement in desegregation litigation, Karl Taeuber represented the second. A professor of sociology at the University of Wisconsin, he and Alma Taeuber had witten Negros in Cities, in 1965. This book dealt not with school segregation, but with residential segregation The picture it painted was bleak: unlike other ethnic groups which, over time, slowly "melted" into the general population, black Americans continued, decade after decade, to remain walled off in their own communities. While Professor Taeuber's area of expertise was not directly probative to the central legal issues in the case, it served several purposes for the NAACP. His analyses of the unique situation in which black (and Mexican in the Southwest) Americans found themselves in this society laid the groundwork for a new attack on school policies. First, by showing that numerous social and governmental agencies had acted with racial animus, it raised the question of whether the school board had not done the same. Second, by indicating that a "neighborhood school policy" inevitably had the effect of perpetuating segregation, it suggested that school boards were at least negligent when the "natural, probable and foreseeable result of their plan was segregation" (Oliver vs Michigan State Board of Education, 508 F. 2d. 178, 182 - 6th Cir., 1974). Thus, it helped undermine a defense that the school board had acted neutrally, and had done nothing wrong. In addition, it made the point, early in the trial, that the ultimate remedy would have to go beyond neighborhood school policies if significant racial balancing were to occur.

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[12] See St. John, 1975; Weinberg, 1975; Crain and Mahard, 1978. It is important to note that these reviews synthesize studies of "desegregation as currently undertaken". Very little desegregation has yet been undertaken in ways that support high quality interracial education, or that are consistent with the recommendations embodied in the social science appendix to Brown. See our discussion of some critical intervening factors in Chapter 1 and the remarkably farsighted section on remedies in Clark (1953).

[13] David Armor was deposed in the Detroit case on the METCO study, but never testified. As in the earlier southern cases, attempts to introduce this line of findings were often met with responses that the data was irrelevant as condemning the legal facts in Brown.

Taeuber testified in numerous cases for the NAACP and other plaintiffs. With Robert Green (testifying to educational harm) and Martin Sloan (testifying to federal and state housing policies which perpetuated residential segregation), the NAACP was able to win case after case in the north and west. The residential segregation testimony, however, like the Coleman report before it, could be a two edged sword. From the plaintiff's point of view it had two potential long term benefits. First, if it could persuade the courts that a neighborhood school policy, per se, was proof of segregative intent, proof in the cases would be greatly eased.[14] Hopes for this line of arguments were dashed in Washington vs Davis and Village of Arlington Heights, but the 1979 Dayton and Columbus cases have breathed new life into such a position. In some cases, a more ambitious effort was made to argue that segregative impact, and not intent, was the correct measure of violation. Second, the testimony of Taeuber and Sloan laid the groundwork for the legal argument that intentional segregative acts by any public agency, not only school boards, should trigger a desegregation remedy. Such a ruling could open the door for metropolitan plans. However, the argument was not accepted in Detroit (Milliken vs Bradley 418 U.S. 717, 1974), and has not produced metropolitan remedies except when government officials have been found to act with the specific purpose of segregating schools across districts (Wilmington, Louisville and Indianapolis).

The other side of the coin, however, is that if the remdy in desegregation cases is to be limited to undoing the segregative effects of school board acts (incremental segregative effect), one could interpret Taeuber's argument as saying that a great part of school segregation is not the product of school board action. If school segregation, or most of it, is not the product of school board action, why should the school board be held accountable for it? Thus, defendants' argument laid most school segregation at the feet of residential segregation, and further that residential segregation was fundametally a matter of the individual housing preferences of white and black citizens. Using data collected by Farley et al. (1978) and others, David Armor and his colleagues attempted to demonstrate that black and white housing preferences alone were sufficient to explain almost all school segregation.

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[14] This was a clear move in the direction of a more structural analysis of the issues.

The plaintiff experts countered with two lines of argument. First, they argued that one important cause of residential choice was the availability of good schools, and that by segregating schools the Board of Education helped produce segregated housing.[15] Second, if individual preferences do determine housing patterns, where do those preferences come from? The answer, according to plaintiffs, was that they came in part from people being raised in racially separated environments. Housing preferences which today tend to segregate neighborhoods are a legacy of past school (and other types of) segregation. This is the basic argument presented by plaintiff experts in the social science appendix to the briefs in Columbus and Dayton.[16]

The Court's opinion in Dayton II and Columbus seems to assume a clear causal connection between school board acts and the amount of segregation in a system. Like the harm question in Brown, the reciprocal effect question in Columbus-Dayton is now a "legal fact", and it is unlikely that any amount of data from defendants could persuade the courts to a contrary position. However, defendants who cannot turn demographic arguments to their benefit at violation, may experience greater success at remedy. If the courts are to believe plaintiff experts, and agree that school segregation influences residential location, they are confronted with a defense argument that attempts to desegregate will, very likely, cause significant relocation.

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[15] This argument about the "reciprocal" effect of schools on housing is presaged in Swann, where the court stated: "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods." (402 U.S. at 20)

[16] The plaintiff appendix sidesteps the issue of exactly how much current segregation is produced by these past factors by saying exact mesurement is impossible.

> "Social scientists have been asked how much effect discriminatory and segregative school policies has on residential segregation and what exactly was the reciprocal effect of that incremental residential segregation of school attendance patterns that result from direct and indirect effects of individual discriminatory actions taken in the past by school officials. Social Scientists cannot answer such questions with precision." (Columbus Appendix, 1979:19a).

Thus, large scale remedies will have a limited effect because of what is commonly called "white flight".[17]

In 1975, Coleman and his colleagues published a study implying that desegregating schools led to white withdrawal from the school districts. Again the argument led to heated controversy in the academy (Pettigrew and Green, 1976; Rossell, 1975-76), but the present consensus would appear to be that desegregation plans will lead to some white withdrawal, depending on the nature of the plan. The key variables determining the rate of withdrawal would appear to be: (a) time--most withdrawal occurs in the first years of a plan; (b) direction of busing--one way busing of blacks to white schools leads to less withdrawal than does two-way busing; (c) percent minority--schools with larger percentages of minorities after desegregation will experience greater white withdrawal; (d) areal extent of plan--a metropolitan plan leaving families few convenient places to move to escape desegregation reduces withdrawal; and (e) distance--plans requiring long white commutes lead to greater withdrawal.[18]

While the courts stated in early southern cases that no amount of white resistance could cause them to limit constitutional rights (see Cooper vs Aaron, 358 U.S. 1., 1958), the concern over white withdrawal has had an apparent impact on remedies. Substantial white flight frustrates a remedy by removing one of the key elements needed for racially mixed schooling. Since courts will not order area-wide (metropolitan) desegregation plans in many cases, they have attempted to create some residential school stability by engaging in limited desegregation (see Detroit and Los Angeles), or by putting most of the transportation burden on minority children (see Indianapolis). Thus, there is less racial mixing, but hopefully a larger and more stable white population to mix with. Without area wide plans, however, inner-city only desegregation plans, which achieve both comprehensive racial mixing and stability, are unlikely.

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[17] The two positions are logically compatible. Segregated schools may create stable, but segregated neighborhoods. Desegregating these schools upsets these relatively stable segregated patterns and causes white families to withdraw children from now desegregated schools. Essentially they change their family residence so that their children may attend "whiter" schools. Indeed, from one perspective, the existence of white withdrawal is evidence that plaintiffs are correct in arguing that school racial makeup has a significant impact on residential patterns.

[18] Of course, one-way plans mitigate this effect for whites, but often at the expense of minority children, who are confronted with a larger commute from their neighborhoods.

The Past and Future of Social Science in School Cases

This brief review of social science involvement in school desegregation cases suggests several themes regarding the history and future of social science involvement. First, and most obviously, the social science evidence presented in school desegregation cases has varied considerably over the years. The thrust of the testimony changed as the cases changed, so that issues important in the 50's were rarely raised in the 60's and 70's. One way to describe the change is to consider the data under consideration. In earlier years, most of the data were psychological or social psychological in nature; they examined the effects of segregation and desegregation on school children. In the last ten years, these data have become less important, and have been replaced with demographic data on school assignments, residential segregation and white withdrawal.

The movement toward demographic data is compatible with a movement by the courts toward a more structural understanding of race relations. The data examine school conditions produced by institutional arrangements (the housing and job market). It adopts a wider frame of reference within which scholars and litigants examine how school systems operate. Has the social science evidence helped to cause this change in the law, or were changes in the data base the natural effect of legal changes? This is a version of the frequently asked question of whether social science evidence has any effect in these cases. Clearly the evidence changed as a consequence of legal changes, but it is not unreasonable to conclude that the effect was to some extent reciprocal. Most clearly, the fading of harm arguments must in part be attributed to the inability of social scientists to demonstrate significant academic harm from school segregation, per se, or significant academic benefit from school desegregation plans which begin (and end) with the achievement of racial balance.

Second, during the late 60's and 70's there was a break in the generally united front presented by social scientists. As a small but growing number of experts became active for defense groups, their arguments downplayed the role of public institutions in causing segregation, and focused upon a more individual view of the causes of group inequality (e.g. group culture or family life style used to explain differences in children's academic achievement), and racial segregation (e.g. the personal housing preferences of white and black citizens). Plaintiff experts, on the other hand, continued to pursue a more structural view, finding the causes of segregation and inequality in the arrangement of public institutions. Consider the excerpt from the Penick social science appendix presented earlier in this chapter:

> The actions of school officials are part of a set of discriminatory actions by government agencies and institutions. The web of discrimination is the basic cause of school and residential segregation (1979:13a).

Third, in several instances the social science findings, particularly in large studies, have "cut both ways", have been used by both plaintiff and defense parties to support their arguments. In part, this occurs because social science often is used as a weapon in these cases. Despite any scholar's attempt to remain above the battle (and not all did or wanted to), once the data was in the public domain it became part of the contest. In some situations, this led the scholars who generated the data in the first place to re-enter the policy arena in order to try and correct "misinterpretations" of their findings. Moreover, in part the double-edged effect occurs because there are no "crucial experiments" available in the social sciences that may settle such controversies evermore. The constantly changing set of conditions prevailing in human social interaction, and the uncontrollable social environment surrounding such interaction, deprives us of anything more than the study of "desegregation as currently undertaken." And in part, it may be in the very nature of good social science research to raise more questions and explanatory possibilities than existed previously (Weinberg, 1970; Cohen & Weiss, 1977).

Finally, most observers conclude that the weight of social science evidence suggests that school desegregation has not had the short run effects implicitly hoped for at the time of Brown. Desegregation efforts have not led to stable integrated schools, nor to a substantial improvement in minority student achievement. While long run effects are still claimed, the proof of these is yet to come. If desegregation is to have the desired effects, however, new evidence is needed on how to control white withdrawal and maintain a broad front of community resources for desegregated schools, and how to organize school buildings and classrooms to create a more equal and high quality educational experience for majority and minority children.

What is needed, ironically, is sociological and social psychological data in the same applied tradition of some of the interracial contact literature cited in the expert appendix in Brown. There is an emerging body of literature on these issues, but it has rarely found its way into the desegregation cases.[19] If desegregation is to move beyond racial balance, into the classroom and educational experience of children, and if city schools are to avoid being warehouses for minority youth, more of this work must be brought into the cases and into social policy formation in general. This requires lawyers and judges to look beyond racial balance, per se, and social scientists to come full circle, back to the problems and conditions of successful intergroup contact and structural integration. As the expert appendix in Brown states:

> Much depends, however, on the circumstances under which members of previously segregated groups first come in contact with others in unsegregated situations. Available evidence suggests, first, that there is less likelihood of unfriendly relations when the change is simultaneously introduced into all units of a social institution to which it is applicable (e.g. all of the schools in a school system or all of the shops in a given factory.) When factories introduced Negroes in only some shops but not in others the prejudiced workers tended to classify the desegregated shop as inferior, "Negro work." Such objections were not raised when complete integration was introduced.
>
> The available evidence also suggests the importance of consistent and firm enforcement of the new policy by those in authority. It indicates also the importance of such factors as: the absence of competition for a limited number of facilities or benefits; the possibility of contacts which permit individuals to learn about one another as individuals; and the possibility of equivalence of positions and functions among all of the participants within the unsegregated situation. The conditions can generally be satisfied in a number of situations, as in the armed services, public housing developments, and public schools (1954:437-438).

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[19] We draw brief attention to some of this literature in Chapters 1, 4 and 15.

CHAPTER 4:

VARIETIES OF APPLIED SOCIAL SCIENCE IN DESEGREGATION SITUATIONS

As scholars entered into the consideration of school desegregation issues and problems, they did so with a wide range of assumptions and disciplinary backgrounds. Moreover, they acted in a wide variety of roles. A good number of social scientists, over the years, have attempted to be useful or helpful, and to apply scientific knowledge or techniques to desegregation situations. One of these applied roles involves testimony in the courtroom, but this is only one of a wide variety. Many other options have been and are available. In this chapter, we continue to set the framework and background for this study with a discussion of the range of applied roles social scientists have played in school desegregation settings.

Some problems or dilemmas of applied social science

Unlike the common sense wisdom of ordinary men and women, scientists claim to develop and possess knowledge that more nearly approaches "truth". In fact, social scientists' professional status rests on their ability to generate truths, or objective knowledge, about matters that most people know something about. They assert that the generation of such knowledge relies upon an established set of scientific methods, which help control personal and institutional biases, and which enable them to stand apart from society's traditions and pressures.

Social science supports its professional claims to special knowledge by promoting adherence to the ideals of non-partisanship and autonomy. These ideals are encouraged and enforced by the prevailing power structure of the social science community, and have become operating norms for the profession. Commitments to these norms lead to emphases upon certain kinds of scientific goals, and to specified conventions for research and training. They also create certain patterns of training and socialization for young scholars; review, reward, promotion and publication opportunities for older scholars; and preferred notions of appropriate role options and activities for all scholars. These empowered norms impact heavily on the structure of social science, its relations with external publics, its internal operations, and its accepted principles of "knowing" and "doing."

Debates about these norms have occurred and continue to occur, and to have impact on the operations of social science.[1] Although some scholars stress the purism of their own position, most operate with a series of conscious trade-offs and compromises. However, these debates and compromises do not occur within an open and pluralist context. Because norms of non-partisanship and autonomy are endorsed by the power structure of the scientific academy, scholars who argue their infeasibility or undesirability too strongly, or who depart from them too far in practice, often are labelled as deviant and may be sanctioned for their views and activities. These sanctions lead to a series of dilemmas in the conduct of social science.

The very nature of applied social science, in its varied forms and definitions, promises more involvement in the workings of society and in areas of work fraught with heated disputes between groups with competing interests. At its most general level, applied social science refers to some effort whereby social scientists speak to the issues people and institutions face in the everyday world. It often has a more "interventionist" meaning, focusing on efforts to respond to or ameliorate social problems, to inform social policy and programs, or to create social change. Competing terms, each with their own histories of plural definitions, include: action research (Lewin, 1946), social problems research, policy research (Lerner & Laswell, 1951; Coleman, 1972), and clinical sociology (Wirth, 1931; Lee, 1978). The range of goals for these efforts extends from the pursuit of "useful truths," to the search for meaningful responses to social problems, to the attainment of social justice. Some applied scholars stress the need to study "what is", the current reality affecting or creating social problems; others stress the need to study "what might be", the alternative situations or programs that might reflect or create new social realities.

In addition to problems created by this variety (or as some would say, confusion), applied social science stands as a bridge between the academic sphere and the policy sphere. For instance, as we suggested, the objectives of the academic sphere emphasize the generation of scientifically acceptable and relevant knowledge in a protected environment that minimizes external political and practical influence. The objectives of the policy sphere emphasize concrete responses to existing problems that accomodate the practical, political and economic constraints of that sphere. These broad sets of objectives lead to different priorities, expectations and criteria for: the choice and definition of research problems, the selection of variables, and the evaluations of results of studies, as well as the time frame of the scholarly process.[2]

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[1] We do not explore the full range of these debates here. However, some portions of these debates focus upon the desirability of these basic norms, upon the proper role of the human and social sciences; other debates focus upon their feasibility, upon the realistic possibility of attaining such postures. For further elaboration and discussion of these issues see our extended analysis (Kalmuss & Chesler, 1979), and a variety of historic as well as contemporary commentary (Frankel, 1976; Merton, 1938; Rose, 1956; Shils, 1956).

Applied scholars face these differences head-on, for their craft brings them face to face with the opportunity and need to work in a non-insulated environment that demands recognition and negotiation of extra scientific factors. Applied efforts that satisfy the demands of one sphere may violate those of the other sphere. For instance, Rein and White conclude:

> The research policy alliance is thus quite painful to all participants . . . participation in the alliance involves potential erosions of responsibility and credibility for both the researcher and the policy maker (1977: 130,135).

Thus, while all scholars may wrestle with the norms of autonomy and non-partisanship, applied scholars must wrestle in a more open arena, perhaps in a more vulnerable form. By the same token, while all scholars experience some dilemmas in relating to the dominant norms of their profession, the nature of applied scholarship exacerbates these issues. Applied work increases the probability of involvement in public situations and concerns (challenging the norm of autonomy), and of having to choose between conflicting value priorities, programs or parties in public controversies (challenging the norm of non-partisanship). To the extent that applied scholars visibly and substantially depart from the norms of non-partisanship and autonomy, they are likely to be sanctioned by the scientific community. These sanctions include: labelling applied work as illegitimate and unscholarly; relegating such efforts to a service category which is seldom weighted heavily in hiring, promotion, or tenure decisions; rejecting such work from "first rate" and mainstream social science journals; and excluding or isolating applied scholars from the rewards, opportunities and departments of their academic disciplines.[3]

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[2] Extended discussions of the differences between academic and applied scholarship can be found in various sources including: Coleman, 1972; Etzioni, 1971: Gouldner, 1957; Guskin and Chesler, 1973; Merton, 1957; Merton, 1938; Rein & White, 1977; Weiss, C., 1976; Weiss, J., 1976.

[3] We should note that applied efforts also may generate a series of positive consequences for scholars. Individual social scientists whose work reaches a non-academic audience may receive increased public recognition and rewards for their efforts. Gratification may result from the perception that their work has had an impact on the "real world," perhaps even to furthering the interests of groups or causes they support. Moreover, material benefits and rewards may include the opportunity for "soft money" research and service contracts or consultations, and employment at higher salaries than academic positions.

The opportunities and consequences of applied work, and the negative sanctions that often ensue from the academy, can create potent dilemmas for applied social scientists. The following list outlines several sets of dilemmas that applied scholars often encounter:[4]

a. Political Dilemmas in Applied Work- Applied social science often is carried out in an arena defined by conflict between groups, and these conflicts may shape the nature of scientific work. Moreover, the audience or users of applied work are often partisan individuals and groups with different sets of vested interests in the conflict (e.g. policy-makers, practitioners, elite interest groups, challenging groups). How does one manage the demands from and loyalties to competing interest groups when doing applied work involving multi-party conflict? When most of the scholarly reference group appears to be on "one side" of a conflict, what are the implications of being on the "other side"?

b. Psychological Dilemmas in Applied Work- Applied social science generally is viewed as distinct from academic social science. As applied scholars depart from the established goals, norms and methods of social science, they run the risk of being sanctioned by the academy. Thus, applied researchers may have to work alone, probably marginal to the academic community and perhaps even face scholarly disapproval. How does one deal with feelings of departing from the potentially internalized norms of one's profession and with the negative labelling associated with such practice? How does one create or find an alternative reference group to provide support for applied efforts?

c. Career Dilemmas in Applied Work- The job insecurity and low status created by non-support from the scientific mainstream may lead to dead-end or soft-money careers vulnerable to changing public needs and funds. Applied efforts may necessitate voluntary or involuntary movement to different institutional bases for one's work (e.g. from psychology and sociology departments to professional schools or applied research centers). How do scholars engaged in applied efforts obtain or maintain appointments in their academic disciplines and departments? How do scholars located in professional or applied schools or departments maintain legitimacy with their disciplinary colleagues? How do applied scholars get information about alternative role conceptions and stable alternative careers?

d. Skill Dilemmas in Applied Work- Social science training generally is focused on the acquisition of scientific research methods that enable one to work and communicate with academic colleagues. Applied work often is directed to non-academic audiences, and may require a scientific technology that responds to different priorities and criteria and to rapidly changing political conditions. Moreover, applied efforts often focus on the utilization of knowledge, requiring scholars to do more than generate information and understanding for a project to be complete. Few training programs exist to prepare scholars for the variety of efforts discussed here. How does one acquire the skills necessary for various kinds of applied research and action? How does one move beyond generating knowledge to utilizing it or facilitating others' utilization?

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[4] These are certainly not the only dilemmas facing applied social scientists. Sources of funding (including decisions regarding the conditions of accepting funds), accountability and feedback processes, and the scholar's relations to research subjects or action collaborators all pose relevant and serious dilemmas for the applied social scientist. Our limited focus in this chapter should not be interpreted as a negation or diminution of the relevance of other issues.

The shape and intensity of these dilemmas vary with the nature of the applied scientific effort (i.e. researchers using established research techniques to generate scientific knowledge in order to serve the "public good" probably are faced with less explicit and intense dilemmas than those using innovative methods and action roles to advance the partisan interests of a particular party in a public controversy). In the next section, we explore the concrete relationships between different applied efforts in school desegregation settings and the dilemmas described above.

A Typology of Applied Social Science Efforts in School Desegregation[5]

What are some of the roles applied social scientists have played in school desegregation? The following discussion presents a typology of different applied roles that actually have been employed. As in any typological effort, the boundaries between categories are not firm or fixed. Our intention is not to "box" individual scholars and their efforts by placing them into one category or another, but to explore the options and dilemmas different scholars face. As the following discussion indicates, there is substantial heterogeneity in applied efforts in desegregation, once again defying the notion of a single, simple, and coherent definition of applied social science.

Research on school or social processes that has implications for understanding desegregation

Numerous social scientific studies have focused on variables useful for understanding the dynamics of school desegregation. Some of these studies were commissioned explicitly for applied purposes, but many others were generated by researchers in pursuit of basic knowledge about social processes. In the latter case, they may have had unintentional utility for scholars, practitioners, and policy-makers interested in school desegregation. The various forms of this work tend to utilize traditional research techniques, and their goal is generally the pursuit of scientific truth.

Examples of this research from the field of psychology include Allport's early work on the "contact hypothesis" in intergroup relations (1954), Pettigrew's research on peer and reference group influences on racial attitudes and interactions (1959), and the Clarks' studies of black youngsters' self-esteem and racial preferences (1947). These works all have been applied by the original authors or other scholars to the dynamics of school desegregation. In sociology, early work by the Taeubers (1965) on racial residential patterns also has been extended to help understand racial segregation in public schools (Roof, 1979). Moreover, a long history of basic research on black and white students' achievements in school helped guide the Coleman-led study on Equality of Educational Opportunity (1966). The work of Jencks and others (1972) on the relationship between class, race, and educational attainment summarized a long tradition of scholarly research on education and socio-economic stratification. It, too, has been applied to debates about the utility and mechanisms of school desegregation.

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[5] The focal arena of school desegregation primarily limits this inquiry to the fields of sociology and psychology. Economists and political scientists appear to have a different disciplinary history with regard to applied concerns, and scholars working on other substantive problems may deal with different issues and operate in different applied arenas. Thus, they should experience different dilemmas.

These applied efforts closely approximate the non-partisan and autonomous priorities of academic social science. As a result, in its original and scholarly form this work is fraught with few psychological and career dilemmas resulting from deviations from the norms of the social science community. Moreover, its close adherence to traditional social science methods eliminates a major source of skill dilemmas associated with some applied work.

These efforts are not dilemma-free however. Political dilemmas may emerge after the research is completed, when and if researchers find they are not in control of its interpretation or application by other social scientists or policymakers.[6] For instance, several scholars associated with the Coleman report noted such dilemmas when their data were used to extol rather unambiguously the virtues of school desegregation, thereby serving to support a policy that they questioned.

Research on specific school practices or innovations

Research attempts to study "what is" sometimes have been extended to begin the study of "what might be". In one form of the latter effort, social scientists have tried to develop, examine and refine particular programs or practices they think might improve interracial education. Generally, the ideas for such innovative programs come from theoretical and empirical work in education, sociology, and psychology, as well as from a history of education practices. This work tends to utilize traditional social science methods to rigorously test programmatic ideas in laboratory settings before they are applied in natural settings.[7]

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[6] Or when they apply it themselves, generally in ways discussed in Chapter 3 and in later sections of this chapter.

One set of innovations subjected to systematic research has focused on the dynamics of interracial relations among youth and between youth and educators. Roughly based on the "equal status contact hypothesis", Cohen et al. (1976; 1973), Aronson et al (1975; 1976; 1977), Schofield (1978), Slavin (1977), and Johnson and Johnson (1975) have been experimenting with new classroom organizational forms and their effects on learning, classroom dynamics and racial relations.[8] Their research has been published in scientific journals, and also has been made available to school officials through educational journals, speeches, seminars, workshops, and consultations.

To the extent that scholars ground programmatic innovations in social science research and theory, and test them with standard research techniques, their work does not depart significantly from the established norms and methods of social science. Thus, they are not likely to experience psychological, career or skill dilemmas. However, these dilemmas may occur after completion of such research, if the scholars have generated a practical product that can be used in schools. When researchers advocate adoption of their product by school systems they become directly involved in intervention, thus violating the norm of autonomy. Some of these innovations are highly controversial, as for example bi-lingual education, new pedagogies, alternatives to suspension, and teacher or staff retraining. When some groups resist and others endorse the innovation, researchers become part of a partisan conflict, thus violating the norm of non-partisanship. Scholars' departure from traditional norms invite stigmitization or sanctioning by professional colleagues, which induce psychological and career dilemmas. Finally, the adoption of an intervention role may yield skill dilemmas if scholars lack prior experience in communicating and collaborating with educational practitioners and community groups.

Research attempting to evaluate desegregation efforts

The attempt to develop and implement new public policies often brings with it efforts to evaluate these innovations or social changes. Social scientists have been involved in several noteworthy and large-scale efforts to track and assess the effects of school desegregation (Crain, 1973, 1974; Coulson, 1976, 1977; Forehand et. al., 1976).[9] These efforts have been marked by extensive collection and analysis of survey data on student, educator, and parent attitudes, student test scores and school records. In addition to these large-scale multi-system studies, there also have been numerous studies of particular locales undergoing desegregation that have used similar research techniques (Armor, 1970; Gerard & Miller, 1975). Departing from the quantitative tradition, Rist (1976) did an ethnographic study of desegregation in one school, and Metz a study of several junior high schools (1978). Much of the above work has been summarized in comprehensive reviews of the scientific literature on the effects of desegregation (St. John, 1975; Weinberg, 1977; Epps, 1975; Cohen, 1975; Crain and Mahard, 1978).

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[7] In some cases, these "tests" have been conducted on large-scale quantitative survey and evaluation data sets. Here scholars are not "creating" new practices based on previous theoretical and empirical work; rather, they are using traditional scientific methods to "identify" successful practices that are being used in the field.

[8] See the discussion of these issues in Chapter 1.

On the one hand, this type of research often reflects the posture of the truth-seeking scientist whose secondary goal is the generation of data that will help policy-makers reach informed decisions. As such, it does not represent a departure from the scientific norms of non-partisanship and autonomy and thus does not generate resultant dilemmas. On the other hand, because such research often is funded by public agencies concerned with application, it generates pressures for utilization. These pressures may lead to behavior that departs from core scientific norms. If evaluation researchers translate their findings into policy directives, they are involved in direct intervention into the policy process, thus violating the norm of autonomy. Departures from autonomy may be augmented if funding agencies have vested interests in the outcomes of the evaluation. Finally, the translation to policy directives often leads to advocacy of particular policies or programs, and thus represents a departure from the norm of non-partisanship. These normative violations may yield psychological and career dilemmas.

Evaluation researchers may experience skill dilemmas as well. Although such work generally relies on traditional social science methods, its base in the field may require methodological compromises and innovative techniques for which scholars have not been adequately trained. For example, necessary information may not be available in standardized form, and random subject designs may be impossible. Departures from established scientific procedures lead to the devaluation of such work by the social science community. This may explain why much of this work is located outside universities, in profit or non-profit research foundations, or in research departments of large school systems. These institutional locations create additional psychological and career dilemmas for evaluation researchers oriented toward academic institutions, identities and roles.

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[9] As noted previously, one of the central problems in evaluating desegregation is that it is not a binary variable, nor even a single and clearly defined variable. The "effects" of desegregation are seldom due to racial mixing, per se, but depend heavily on the manner in which a local school system implements such new programs -- with what speed or timing, over what grade levels, in how many schools, with one- or two-way transportation, with what preparation for students and parents, with what new curricula, with what if any attention to new classroom dynamics or organizational structures, etc. Good studies of the effects of desegregation respond to its particularistic nature by relating any effects or outcomes to the specific desegregation plan and implementation program.

Consultation with national (or high-level local) policy-makers and elites

One way in which social scientists concerned with school desegregation participate in applied roles is by working directly with decision-makers in the establishment of educational policy. Scholars generally do this work in concert with federal policy-making agencies, such as the United States Commission on Civil Rights and the Department of Education, as well as in state and local departments of education. They also may testify in congressional hearings on educational policy, serve as consultants to various commissions or panels, or use other means to influence national or state policy. Pettigrew (1971) conceptualized such a role for scholars as "honest brokers" between social science and policy-makers.[10]

This variant of applied social science clearly violates the norm of autonomy, since scholars are attempting to have direct input into the formation of social policy. At the same time, it may be seen as compatible with the scientific norm of non-partisanship, if it is perceived as aiding the overall public good, rather than a particular party or policy. A link to governmental agencies maintains an aura of neutrality, especially for advocates of a consensus ideology wherein the government often is seen as a neutral purveyor of public policy, rather than as an involved party with its own set of vested interests. To advocates of a conflict ideology, governmental agencies are seen as vested interest groups (or agents of such groups): as such, these applied efforts cannot possibly be considered non-partisan. Even if scholars do not personally intervene to shape policy, their intentional or unintentional sharing of information with only one party in a multi-party conflict would be seen as partisan.[11]

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[10] In fact, it often is seen as performing the function of "enlightening" public policy-makers (Street and Weinstein, 1975).

[11] An extended discussion of these distinctions between consensus and conflict ideologies and their occurrence in the social sciences, is presented in Chapter 1. An explicit discussion of some of the problems of sharing information are explored in Rainwater & Pittman, 1967.

When the partisan nature of such work remains hidden, political dilemmas generally are not a major problem. However, overt departures from autonomy may lead to the sanctioning of these efforts by the academy, thus producing psychological and career dilemmas for participating scholars. These dilemmas may be exacerbated if a scholar's work offends elites who are linked to powerful figures in the social science community, and can influence them to stigmatize, constrain or censor the offending scholar.

Finally, making policy and working closely with policy-makers involves a broad set of skills not included in the training of social scientists. Basic skill dilemmas are escalated when policy-makers feel they need answers, not questions, and do not tolerate the scientifically appropriate qualifications of cautious scholars. When scholars bend to these needs, they may encounter further psychological, career and skill dilemmas.

Presentation of social scientific evidence in court proceedings

Social scientists may apply their knowledge about school desegregation issues through involvement in litigation and judicial proceedings. Most frequently, this involves the role of expert witness (Schwartz, 1978; Pettigrew, 1979; Wolf, 1977a), although it also may take the form of court-appointed master, monitor or consultant to the judge (Dentler, 1978). As expert witnesses, scholars serve one of the parties in the litigation, whereas in the other roles they function directly for the court. As noted in Chapter 3, in several instances social scientists have operated in concert to present evidence in the form of an amicus brief.

Scholars who participate in litigation violate the norm of autonomy because of their active involvement in the translation and utilization of social science in the policy domain. Moreover, the alignment of expert witnesses with particular parties in litigation clearly violates the norm of non-partisanship.

Political dilemmas for expert witnesses extend beyond departures from non-partisanship itself. School desegregation tends to be supported by the social science community because of its consistency with the liberal goals of civil rights, equal opportunity, and racial integration.[12] Thus, scholars who testify for defendant school boards opposing desegregation often are perceived by colleagues as being on the "wrong side" politically. Peer disapproval and sanctioning results in political dilemmas for the "renegade" scholars. In addition, when social scientists feel that their research compels them to testify against parties with whom they were previously aligned ideologically (e.g. National Association for the Advancement of Colored People, American Civil Liberties Union, Mexican-American Legal Defense Education Fund), they may experience other political dilemmas as well. Psychological and career dilemmas may result from these violations of the norms of non-partisanship and autonomy.

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[12] Evidence of the generally liberal ethos of American social science is provided in Ladd and Lipset (1975), and its effects discussed in more detail in Chapter 8.

Another source of psychological dilemmas is the adversarial nature and legal-adversarial norms of the courtroom, which challenge experts' ability to adhere to the scientific norms of neutral and balanced presentation. For example, lawyers typically encourage their experts to omit scientifically relevant complexities, qualifications, and opposing evidence that they feel do not help their case. The incompatibilities between social science and legal-adversarial norms may yield psychological dilemmas or role conflict for experts (Pettigrew, 1979; Wolfgang, 1974, Schur, 1968).[13] These dilemmas are intensified under the open and direct attack of cross-examination, a type of challenge to which academics are unaccustomed. Finally, skill dilemmas are common for expert witnesses, due to the need to accomodate to legal norms and procedures which are unfamilar and perhaps uncomfortable for scholars accustomed to social science norms.

Research that documents or suggests new school practices

We have discussed applied research that experiments with and evaluates new school or community policies and practices relevant for successful desegregation. Other applied scholars attempt to provide useful information to non-academic groups involved in desegregation by documenting and illustrating useful practices that might be applied in school settings. These latter efforts typically focus on innovations that have been used "successfully" in schools and classrooms, rather than on those that have been rigorously tested in the laboratory. Moreover, while the former efforts primarily focus on the dynamics of the innovation itself, the latter are more interested in how a given practice can be successfully implemented, or in what change processes must be organized for a new program to be put into operation.

Efforts of this sort include hearings and reviews conducted by the U.S. Commission on Civil Rights with regard to the ways in which desegregation has been planned and implemented in various communities (Fulfilling the Letter and Spirit of the Law, 1976). In addition, Noar (1966), Burges (1978), Chesler, et.al.(1970)

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[13] Some interesting parallels between social scientific and legal conceptions of neutrality and non-partisanship, and the difficulty of adhering to such norms, are explored in Yudof (1978).

and Forehand and Ragosta (1976) have created handbooks or manuals suggesting how new educational practices and other desegregation-related innovations may be implemented successfully.

This work involves direct attempts at intervention in order to provide needed practical information to policy-makers, school personnel and community members about "what might work" in schools and neighborhoods undergoing desegregation. It therefore violates the norm of autonomy. When and if different groups prefer different programmatic options, the non-partisanship of scholars engaging in this work may be compromised as well.

The above deviations from the norms of non-partisanship and autonomy lead to psychological and career dilemmas for participating scholars. Such dilemmas are particularly intense in this type of work, because of its explicit focus on practical issues relevant to policy-makers and practitioners, rather than on theoretical issues relevant to the academic community. The overt applied orientation leads to strong devaluation of such work by the academy. Finally, skill dilemmas are particularly prominent here because the investigative techniques utilized are not found in social science training programs. New skills in communicating and working with non-academic individuals and groups who operate under practical and political constraints and pressures also are problematic for scholars trained to value scientific precision and detachment.

Consultation with local consumers or clients of schools

Some applied social scientists concerned with school desegregation have focused their efforts on working with local clients or consumers of schools. Scholars who write desegregation plans for plaintiff groups in school desegregation cases provide one example of this type of work.[14] Those who work to educate student or community groups regarding their interests, options for change, tactics for mobilization and the means of holding local educators accountable are another example.

These scholars openly diverge from the norm of autonomy in their attempts to have direct input into school and community policies. They also depart from non-partisanship, because of their clear identification with specific parties in a conflict situation. As noted previously, the fact that the parties to whom they are tied are low power groups tends to label this work as more partisan than similar scholarly efforts on behalf of governmental or private elites.

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[14] Exemplary plan writers for plaintiff groups include Gordon Foster, Michael Stollee and John Finger. Descriptions of the issues and options they may consider in their work can be found in Foster (1973), Tompkins (1976), and in a new work written by plan writers who often work for defense groups (Hughes, Gordon & Hillman, 1980).

On one level, the political dilemmas associated with such work may be muted. The scholar is no longer attempting to maintain a neutral position in the midst of a conflict situation, but rather has consciously chosen one side of the dispute. On the other hand, the political consequences of working for low power groups (and potentially against elites) can be intense. Elite representatives can be expected to resist, delegitimize or otherwise attack such scholars and their efforts. If such elites are accustomed to using social science for their own ends, they may mobilize scientific gatekepers to sanction these scholar's efforts.

Explicit violations of the norms of non-partisanship and autonomy involved with such work yield almost certain sanctioning by the academy, which in turn produces psychological and career dilemmas. The sanctioning and dilemmas are particularly potent because the academy may be threatened by scholars who do not attempt to create the veneer of non-partisanship. Skill dilemmas also result from the scholar's lack of training in human relations, community mobilization, and crisis intervention and mediation appropriate for such work. The skill dilemmas may prompt scholars to seek special training and perhaps to practice their craft in non-academic institutions. This further isolates them from the mainstream of their profession, thus escalating psychological and career dilemmas for those still identified with their academic disciplines.

Summary

Figure 4.1 summarizes some of the interactions between various dimensions of applied social science and the normative conflicts and experiential dilemmas we expect are attendant upon such work.

The figure clearly suggests that the frequency and intensity of dilemmas associated with applied social scientific efforts will vary with the extent to which they deviate from or challenge traditional norms of non-partisanship and autonomy.

This review of applied social scientific efforts helps set the stage for a more intensive discussion of one of these potential roles, presentation of testimony in the courtroom. The courtroom is a relatively unique applied arena, one fraught with some particular stresses and opportunities. However, a detailed analysis would probably indicate that some uniqueness is just as true for most of the other roles, at least for those that depart most significantly from the established academic environments and roles. As we proceed with our inquiry into the particular nature and problems of applied social science in the courtroom, we will try to discover the extent and ways in which any of the dilemmas discussed here are present in the experience of applied scholars.

Figure 4.1

Frequency/Intensity of Dilemmas in Applied Social Science

Applied Role or Endeavor	Degree of Norm Violation		Frequency/Intensity of Dilemmas Experienced			
	Non-partisanship Norms	Autonomy Norms	Political Dilemmas	Psychological Dilemmas	Skill Dilemmas	Career Dilemmas
A. Research on school and/or social processes	Low	Low	Low	Low	Low	Low
B. Research on specific innovations	Low	Low/Medium	Low/Medium	Low/Medium	Low/Medium	Low
C. Evaluation research	Low/Medium	Medium	Medium	Low/Medium	High	Low
D. Consultation with elites	High or Low*	High	Low or High*	Low	Medium	Low
E. Presentation in court	Medium	High	Medium/High	High	High	Low/Medium
F. Documentation research	Medium	High	Medium/High	High	High	Medium/High
G. Consultation with low-power groups	High	High	Medium	High	High	High

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*As indicated throughout this chapter, there are at least two ways to see some of these roles and activities. The consensus perspective of applied social science generally held by the academy does not view consulting with elites (or with judges, etc.) as a real deviation from non-partisanship because these elites generally are viewed as neutral guardians of the public good. The conflict perspective views such applied work as deviating from the norm of non-partisanship because elites are seen as sharing a set of partisan collective interests which they seek to protect against other groups. This distinction has implications for the experiential dilemmas as well.

CHAPTER 5:

METHODS AND ANALYTIC APPROACHES IN THIS STUDY

The primary data base for this research project investigating the use of social science evidence in school desegregation litigation is indepth interviews with expert witnesses, judges and attorneys who participated in a sample of school desegregation cases. In addition, we reviewed case records, briefs, judges' opinions and transcripts of court testimony in some of these cases. This chapter discusses the background of prior studies, the sample, interview format, interviewing process and data analysis procedures for each group of actors and each set of data.

Prior Research on Social Science Evidence in Desegregation Litigation

Scholarly concern with the nature of social science testimony and evidence in the school desegregation cases does not begin with this study. Various scholars, with different concerns and a variety of methods, have explored these issues. For instance, one approach to the question of social science and judicial action in desegregation cases has been to conduct social scientific research on matters relevant to desegregation issues, or to gather and analyze research that has been done in this area. In this connection the most popular issues appear to have been those reviewed in Chapters 3 and 4:

- the extent and causes of residential segregation,
- the relationship between residential segregation and school attendance areas/boundaries,
- the relationship between desegregation and residential patterns (white flight),
- the analysis of social factors associated with learning,
- the relationship between desegregation and achievement scores,
- the relationship between bussing and achievement scores
- the existence of school practices dysfunctional to desegregation.

This list could be lengthened, and indeed could be endless, as different scholars had different notions of relevant issues and evidence.

A second approach to the general question of social scientific evidence in the desegregation cases has involved the review of case records to assess what evidence has been presented, and the review of the quality or relevance of this evidence. For the most part, such research has been conducted by legal scholars, and their emphasis has been upon the existence and use of evidence, rather than its evaluation (Levine & Moise, 1975). One notable exception is Wolf (1976), who has studied extensively one case and has analyzed the quality of the social science evidence presented therein in some detail. Since the case involved, Milliken v. Bradley, is a central one in litigative history, her work is a very helpful step forward. The summaries of a conference wherein several social scientists commented on the issues in Milliken v. Bradley is another example of this type of approach (Milliken v Bradley: The Implications for Metropolitan Desegregation, 1974).

A third approach to these general problems has been to investigate the probable or actual impact of social scientific evidence on the court. Typically this has been done second-hand, by reading and analyzing court transcripts or written opinions. In some cases, judges writing these opinions have commented directly on the quality or utility of the evidence they heard. Judge Craven went further, and commented in a public journal on the impact of social scientific evidence on him in the Bradley v. City of Richmond case (1975). In this article, Judge Craven lauded the precision with which Karl Tauber was able to analyze the role of discrimination in creating segregated housing patterns. Moreover, the judge also noted that "The testimony of other social scientists - Dr. Thomas Pettigrew, Dr. Martin Sloane, and Dr. Jeanne Biggar - were not so precise (1975: 155)." It is not clear exactly what Judge Craven meant by "not so precise", and how it came to impress him less, but even this kind of public judicial comment is rare, too rare, indeed.

A fourth major approach has been for scholars - legal or social scientific - to consider and elaborate the problems social scientists can expect to encounter in the courtroom. For the most part, these efforts have been conceptual rather than empirical in orientation, drawing on a long tradition in the sociology of knowledge to warn social scientists of certain pitfalls. For instance, in an excellent review, Levin argued that "Legal proceedings are endeavors in advocacy with each side seeking that evidence which will support its own position" (1975: 233). And in this advocacy arena of the courtroom, Judge McMillan concluded that "Social science weapons are therefore legitimate" (1975: 163). This is a judicial view of the social scientific enterprise sure to cause dismay within the profession, and Wolf summarized her dismay in noting that "The adversary mode in the presentation of evidence always tends to offend our most basic notions of scientific inquiry" (1976: 114). Wolf feels the issue is compounded by the fact that social action agencies, rather than academic social scientists themselves, often are the presentors of such evidence to the judges. According to her, the truth-seeking priority is blunted by adversaries who tend to omit contrary evidence, omit acknowledgements of methodological weaknesses, and stress simple causal chains among variables. In her view, the result is that liberal social scientists have stressed the unabashedly positive effects of desegregation (a conclusion similar to Judge Craven's concern, it appears). Levin, in presenting his own view on these matters, appeared less sanguine about truth-seeking in social science, and less surprised about scientists' adversary role in the courts. He not only reviewed some themes in the social background and training of social scientists that constrain their objectivity, but asserts that in the attempt to be influential on the courts, social scientists were likely to (1975);

> present evidence that stresses complex statistical methodologies that are beyond lay competence to interpret, so to mystify their findings and create reliance on their own interpretations,
>
> shun ambiguity and alternative explanations which might be detrimental to the adversary position at stake (in Wolf 's terms, simple causal chains),
>
> avoid interpretive frameworks that may be ideologically or politically confusing or illegitimate to the court, so Marxist perspectives on the origins of class differences or racial labor market dynamics under capitalism are avoided,
>
> avoid remedies that might go beyond the political feasibilities considered by the court.

Did this happen often? How do social scientists cope with what is at least agreed to as pressures of this sort?

Each of these four prior approaches raises some very important and interesting issues. However, they have not addressed them definitively, nor have they provided us with much sound empirical evidence on what actually occurs in the minds and actions of major actors in these relationships between social scientists and lawyers and the judiciary. In this study, we attempt to look at some of these issues in a different way, by studying actors' reports of their own experiences with social science testimony in the courtroom, and of their own interactions with others in this endeavor. In the following sections of this chapter we describe how we conducted this study.

Sample of Cases

In order to study expert testimony as actors' experienced it, we wanted to set the problem within a specific set of cases, and with a somewhat delimited set of actors who actually encountered one another. Thus, we defined our sample (at least in part) in terms of court cases in which scholars, attorneys and judges dealt with one another fact to face. We drew a sample of 17 school desegregation cases through a two-stage sampling process.

First, we established a pool of cases to be included in a sample: individual cases had to meet the following criteria:

1. They had to be active as of 1970.
2. They had to have been tried in a Federal District Court.[1]
3. They had to have employed academic social science or educational experts as witnesses.

We limited the case pool to those active after 1970, in order to minimize lack of access problems due to death or the possibility of hazyness in the memories of key actors. We elected to focus on those cases reaching the federal district court level because there is where systematic social scientific testimony was most likely to be presented, and where court procedures for handling such testimony was most likely to be regularized. Of course, it also is the judicial arena in which debates about federal intervention in local school affairs, and where concerns about "outsider" attorneys and scientists (both issues of considerable interest to us), most often surface. Finally the selection of federal district courts as a standardized arena avoids the confusion of great variation in cases, issues, testimony and procedures occuring at state and lower court levels. Since the focus of our study involves interaction among social scientists, lawyers and judges, it made sense to limit the case pool to ones in which actual testimony and court appearance occurred. Thus, if no social scientific evidence was presented, or if expert depositions were taken but no actual appearance was made, the case was omitted from the pool.

We compiled a list of all school desegregation cases that met these three criteria, using a directory of federal school desegregation cases published by the Center for Civil Rights at Notre Dame Law School (Wise, 1977).[2] This step resulted in a population of 69 federal pupil desegregation cases involving social science evidence that were active after 1970. Of these 69 cases, 39 were from Southern (and border-Southern) states, while 30 were from Northern and Western states; 37 were from relatively large urban areas, while 32 were from small cities or rural areas.

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[1] An exception was made for the Los Angeles school desegregation case, which was tried in a state rather than a federal court, because it employed experts in a non-traditional manner - as a panel to the judge.

In the second stage of the process, we chose a sample of 17 cases from this larger pool. We purposively included the Detroit, Richmond and Los Angeles cases. The first two were selected because they represented a northern and near-southern version of a metropolitan suit. Metropolitan desegregation is a key legal issue involving the inclusion of neighboring (predominantly white) school districts in the desegregation of a large (high proportion minority) city district. It also raises interesting evidentiary problems, and we wanted to ensure representation from this class of cases in the final sample. Los Angeles was included because it employed a novel use of academic experts, a panel of scholars responsible to the judge.

The remaining 14 cases were selected by constructing a 4-fold matrix of larger and smaller school districts and northern and southern (pre-Brown, state imposed segregation) cases. We wanted a mix of cases from the North and South and from large and small cities. Region captured the key legal distinction between de facto and de jure segregation. In addition to being legally important, the de jure-de facto distinction represents different challenges for experts. While de jure segregation is a clear violation, de facto segregation requires plaintiffs to prove violation on the part of the school board. They may respond by using experts to show indirect governmental involvement in the segregation of American cities and schools. Size of city was important because we expected the legal, political and educational issues (and therefore the scientific evidence) involved in desegregating a large city to be different from those involved in desegregating a small city. Issues of a stable white population, metropolitan school plans, state and local culpability and housing segregation are all likely to take different shape in school districts of cities of markedly different size. From each of these four (region x size) categories we chose cases which were legally and/or politically significant, which had various types of expert testimony, which had judges of varying political reputation, and which together seemed to provide a reasonable sample of school desegregation cases across the nation. The 14 cases selected in this procedure were: Atlanta, Austin, Baton Rouge, Charlotte, Columbus, Corpus Christi, Dayton, Denver, Indianapolis, Minneapolis, Kalamazoo, Montgomery, St. Louis and Omaha. Of the total 17 cases, then, 9 are "northern" and 8 "southern" (in the sense of a de jure dual school system at the time of Brown). City size ranges from Los Angeles and Detroit at one extreme to Kalamazoo and Baton Rouge at the other. Wilmington originally was part of this sample, but our time and energy limits, and difficulty in gaining access to attorneys and judges in that case caused us to drop it.

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[2] Desegregation cases were limited to those focusing on pupil desegregation. Although cases that involved other issues in addition were included, if the major focus was staff rather than pupil movement, it was excluded.

Sample of Actors

Experts

We generated a list of experts involved in these 17 cases by noting the names mentioned in judges' opinions and in other written materials. Moreover, as we began speaking with attorneys, we asked them for the names of experts they had employed. In addition to experts involved in these 17 cases, we used a snowball identification technique to identify other scholars testifying in any desegregation case.

The snowball sample of experts in other school cases was generated by asking attorneys and experts whom we had already identified for the names of other experts. In addition, we placed notices in the newsletters of the professional organizations associated with sociology, psychology, political science and education. These notices briefly explained the study and asked individuals who had testified in school desegregation cases to contact us.

The sample size of academic-based experts was 85.[3] Of these, 2 refused to be interviewed, and our sample-size thus was 83. Not all of those interviewed were used at each stage of the analysis, for various reasons. As Table 5.1 indicates, not all these interviews were full and complete; some were not taped or were otherwise too scanty to permit full analysis (13).[4] Moreover, during the interviews we discovered that several informants had not actually testified (but had perhaps given a deposition), and several others had appeared in court, but not as an expert witness (as a consultant, panelist, etc) (16).[5] Of the 83 experts we interviewed, 51 were social scientists and 32 were educational scientists.[6] Of those who actually testified, 42 testified for the plaintiffs and 26 for the defense; 4 experts testified for both parties in different cases. Thrity-one experts testified in more than 1 cases. These frequent testifiers illustrate that the use ofexperts in these cases is more prevalent than indicated by the sample size itself: the total number of person appearances is well over 200.

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[3] The possibility exists that this sample is not representative of members of the academic community, because all of our respondents were asked to testify in school desegregation cases. Testifiers systematically may differ from scholars who were asked to testify and declined or from others who were not asked at all. The former may be more oriented toward applied and perhaps activist scholarship than either latter, and their sub-discipline or substantive concerns may be quite different. Moreover, they may be more accustomed to applied work and thus more comfortable with the adversarial nature of the courtroom than other scholars. Although selection bias may be a problem, the following chapters indicate there was substantial variance among respondents in their conceptions of appropriate applied roles and in their behaviors and experiences. The sample does not appear to be composed of a homogeneous group of activist scholars.

The disparity between the number of social and educational scientists and the number of plaintiff and defense experts can be explained in several ways. Some of the issues relating to attroneys' selection and use of scholars, and scholars' decisions to testify are explored in later chapters. However, there also are some potential artifacts of the sample we should note. With regard to scientific experts, we were interested in investigating conflicts between the roles of scholar and witness; thus, we decided to interview primarily academically oriented experts. Scholars employed in settings aligned with one of the parties to the case were eliminated, e.g., educators employed by the school system who testified for the defense. Thus, by focusing on academic scholars, our sample probably underestimated the number of local educators and defense experts utilized in these cases.

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[4] By "full and complete" interviews we refer to those face-to-face conversations in which most of our questions were answered and where a tape of the interview was audible and transcribable. Unfortunately, due to technical taping problems, informants' preferences not to be taped, lack of available time and perhaps resistance or disinterest, not all interviews were "full and complete". Incomplete interviews still were useful for illustrative ancedotal materials, and ocassionally for qualitative analysis, but were excluded from quantitative analyses.

[5] A deposition involves testimony outside the open court, in which the lawyers for both sides are present, but the judge is absent. They generally involve many facets of courtroom testimony, but are frequently viewed as "fishing expeditions".

[6] Professional affiliation (whether scholars were social or educational scientists) was determined by the nature and field of respondents' academic degrees. Amongst the 50 social scientists, there were 20 sociologists, 19 psychologists and 7 political scientists. Five other scholars were not in traditional social science disciplines (e.g. economics, geography), but for our purposes their fields were more aligned with social science than education.

Overall, the sampling process appears to have been successful. Currently we know of only 10 academic experts active after 1970 who were not included in the sample. We assume that the list of experts in the 17 cases was relatively complete, having been generated from judges' opinions and interviews with lawyers. Moreover, the snowball sample began circling back on itself, so that after several months in the field we virtually ceased generating the names of new experts. Rather, informants would volunteer names we already had on our list.

Attorneys

Since many cases contained multiple parties, and parties themselves sometimes used several attorneys, we could not interview all the lawyers who worked on each case. In choosing which attorneys to interview, we always included at least one from each of the major parties to the litigation; at least one school board (defendant) attorney and one plaintiff (civil rights group or government) attorney. Where there was more than one plaintiff or defense group in the litigation (e.g., both the Justice Department and the NAACP, or school board and white parents' group) we interviewed at least one from each group. The choice of which particular attorney to interview partly was guided by a desire to include those lawyers who played a critical role in litigation at the trial level, and who had worked with the scientific experts in preparing the cases. As time and circumstances allowed, we also interviewed additional attorneys from the major parties and from other parties to the suit (e.g., neighborhood groups, state boards of education, etc.).

On these bases we tried to interview 75 attorneys. Six refused, and 17 other conversations were too brief or enmeshed in resistance to be considered full and complete interviews. Of the 69 interviews, 38 were with plaintiff attorneys, and 31 for defense parties. Moreover, 52 were locally based attorneys and 17 were based in national or regional organizations of agencies (LDF, Department of Justice, etc.)

Judges

We wrote to the Federal District Court Judge who heard each of these cases, describing the project, and asking for permission to speak with them. As Table 5.1 indicates, we were successful in gaining access to roughly half the judges (in a few cases a three judge panel heard the case, so the sample pool is larger than 17), but not all those interviews are full and complete either. Although the data on judges is less complete, by reputation and self-report the judges we did interview range across the "liberal-conservative", "traditional-activist" spectrums. Thus they provide at least an indication of judicial reactions to the nature of these cases and the use of social scientific evidence in court.

Table 5.1

Sample Pools and Samples of Social Scientists, Attorneys and Judges

	Social Scientists	Attorneys	Judges
Interviews requested	85	75	20
Refusals	2	6	10
Interviews done	83	69	10
Not testified	16	-	-
Not full/complete interviews	13	17	3
Interviews...full and complete	54	52	7

We were and are sympathetic with all persons' decisions not to be interviewed, or to be cautious in their conversations with us. The controversial nature of school desegregation issues, the partisan environment within which the courtroom use of applied social science occurs, and the dangers of breaches of confidentially surely mitigated against free and open discussions. In this context we were quite pleased with both the response rate and the level of completeness of the interviewing process.

Interview Format

Given the complex and sensitive nature of the issues we were investigating, and the relatively small sample size, we decided to utilize in-depth interviews with open-ended questions. Close-ended instruments would have been more amenable to quantitative data analysis, and would have provided more standardization. However, the potential for sophisticated quantitative analysis was limited by our sample size. Moreover, the richness and depth of information we could obtain from in-depth interviews seemed to justify any loss in standardization.

The interviews with social scientists dealt with eight major substantive areas.[7]

1. Decision to Testify--How did informants get involved in testifying and what did they consider in deciding whether to testify? Who did they testify for and how often?
2. Preparation for Testimony--How did informants prepare themselves, and how were they prepared by their lawyers for testifying? Had they testified before?
3. Testifying Experience--What tensions did experts experience while testifying? Did they find cross-examination to be particularly difficult or stressful? What other forms of testimony might be useful?
4. Role Conflict--Did informants experience conflict between the roles of scholar and witness?
5. Testimony--What was the content of their testimony? The effects? Did they feel that their testimony helped shape the judge's decision?
6. Applied Social Science--What did informants feel was the appropriate role of social science in responding to social problems in general?
7. Consequences of Testifying--Were there any political, personal or professional consequences for the scholar?
8. Attitudes about desegregation--How did informants evaluate court ordered school desegregation in general?

The interviews with attorneys dealt with 7 substantive areas:

1. Decision to use social scientific evidence--Why did they decide to use expert witnesses? How did they decide which experts to use.
2. What was at stake in the case--What was the legal theory guiding the attorney's actions? What legal issues were at stake? What remedies were possible?

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[7] Copies of the exact interview questions for each group of actors is presented in Appendix A.

3. Preparation for trial--How did the attorney prepare himself and expert witnesses? How did he prepare for cross-examination?
4. Testimony--What was the content of social scientists' testimony? Did it appear probative? Was it effective? How else might it have been helpful?
5. Social Scientists--What were the Scientists like?
6. The judge--What tactics were used to influence the judge? Was the judge open to argument, to evidence?
7. Attitudes about desegregation--How did informants evaluate school desegregation as a national policy? What other ways of settling these kinds of disputes makes sense?

The interviews with the judges dealt with 6 substantive areas:

1. The issues in the case--What were the issues in violation and remedy in the case?
2. Social scientific evidence--What social science evidence made sense or was useful? Who presented it effectively? How else might it be useful?
3. Testimony--What other testimony was important?
4. External pressures--What role did the community, Appeals Courts, and the government play in the decision?
5. Was there any use of consultants or monitors in helping to create or implement the order?
6. Attitudes toward desegregation--What is the future of desegregation as a national policy?

The interviews contained a pattern of broad and general questions followed by a set of more specific probes. For example, we asked scholar-experts:

--What factor did you consider in deciding to testify?

--Did the decision generate any conflict for you?
--Did you anticipate any tensions between the role of scholar and that of expert witness? (If yes) What was the nature of that tension?

Another example comes from the interviews with attorneys:

--What was your legal strategy?

--What did you need to show or prove?
--How did you plan to show this?

The general questions enabled informants to identify and discuss issues that were most salient to them. Once we obtained their definition of the issues, we gradually introduced other issues that we felt were important. If informants anticipated and responded to a particular problem in their reply to the general questions, that probe was not asked. If they brought up an interesting issue not included in our questions, interviewers temporarily departed from the interview format and pursued the issue. Thus, although we made sure to ask our questions in a relatively systematic and standardized manner, the conversations themselves were anything but standardized. Different attorneys, judges and scholars had different perspectives and reactions to share; they also had different personal needs to share information and experience that sometimes were painful and distressing, but intriguing and provocative.

Interview Process

We conducted pilot interviews in the summer of 1978 with 8 scholars and 7 attorneys who had been extensively involved in school desegregation litigation. We also held informal preliminary conversations with 2 judges. The pilots involved conversations about their experiences, and helped us identify and refine issues that later was included were in the formal interviews. Some of these pilots were extensive enough to be included in the sample. Other persons were reinterviewed.

The prime interviewing period extended from December 1978 to August 1979. The bulk of the interviews were done by the 3 of us: (1) a white male social-psychologist; (2) a white male sociologist with an LLD; and (3) a white female doctoral student in sociology. The remaining interviews were conducted by 2 female advanced law students, one white and one black. It is possible that some bias was created by the use of different interviewers. However, it is also possible that this procedure generated a richer data set than if one person had done all the interviewing.

Most informants generally appeared to be open and involved in the interviews. There were several indications of their involvement. First, they allowed more time for the interviews than we originally anticipated. We planned on one hour interviews, but their length actually ranged from forty-five minutes to four hours. The average lenth was between an hour-and-a-half to two hours. Second, only 10 informants refused to have their interviews taped. Moreover, several remarked that they enjoyed the interview and were pleased to have had an opportunity to talk about issues that they previously had not found a forum to discuss. This was particularly true of the social scientists. It appears that the interviews served an educational and carthartic function for some informants, allowing them to examine a set of conflicts that they had not publicly discussed before. Some informants explicitly stated that the interview had provided new insights into their courtroom experience. Finally, many remarked that they were pleased that these issues were being systematically investigated, and most expressed interest in seeing the results of the study.

These interview data are subject to all the potential biases of any set of questions which pertain, at least in part, to retrospective reports from informants. Lapses in memory, conscious or unconscious distortion of prior beliefs or experiences, and even relatively minor "shaping" in the communication of values and events have ocurred. Moreover, given the controversial and moral or normative tone to many of the issues focussed upon in the interviews, there may be cases in which informants' reports and interpretations of events were self-serving in nature, helping to make the individual look and/or feel more "whole" or wise or effective. As we coded and analyzed the data, we took care to double check reports for their internal accuracy, and in this report we draw the reader's attention to situations in which these potential problems may be especially relevant or important.

In addition to the interviews, we collected several other kinds of data. For each case, we read some depositions and transcripts of experts' testimony in court. For instance, the courtroom dialogues reported in Chapter 12 are culled from some 2,500 pages of cross-examination in these cases. Moreover, we read some attorneys' briefs and apellate arguments, and judges' opinions. In addition, we read the articles and books many scholars used to backup their arguments, or as other forms of their own professional and political work. The unique data base of the study, of course, remains the interviews. Given the immense amount of material generated in these kinds of cases, we only read selectively from these other materials. Perhaps a more extensive content analysis of these transcripts and other materials is warranted; it would take a great deal more time and money even to gather the materials, let alone analyze them.

Data Analysis

As we began the process of daya analysis we discovered there were some systematic differences in our own preferred styles as scholars. From the outset, we were interested in both describing and analyzing all actors' experiences, and in using both qualitative and quantitative forms of data and data analysis. On some issues, moreover, we proceeded in a somewhat positivist manner, having identified ahead of time not only variables, but ways of targeting these variables in the data set and the analysis. On some issues, we proceeded much more phenomenologically, discovering in the data, themes and issues that began a search to identify actors' experiences and meanings they attributed to these experiences.

Thus, some chapters evidence a style of data analysis and presentation that utilizes micro-coding of the interviews, and that generally resulted in quantitative analyses of the differences between lawyers and scholars, or between various subcategories of lawyers and scholars (plaintiff attorneys vs. defense attorneys, one-time testifiers vs. repeat players, scholars electing scientific norms vs. those electing legal norms). Other chapters reflect the identification of a major conceptual issue or argument, and benefit from a systematic search through the interview materials for evidence illuminating one or another position. Thus, the analysis of patterns of influence on judges, or of reasons for and against the panel mechanism for the use of expert testimony, reflects this approach. So does the chapter on attorneys' decision to use scientific evidence. In other chapters, and on other issues, we primarily set out to describe an issue or problem in the language and meaning sets identified for us by the actors we interviewed. Our encounter with these perceptions and reactions was, of course, also conceptualized in ways that seem to us to sort and categorize actors' experiences. The chapters on characteristics of the good witness, scholarly preparation for witnessing, and cross-examination most clearly reflect this approach.

As an example of the use of a qualitative mode of analysis, consider the kinds of data reported in Chapter 11, characteristics of an expert witness. Our interviews with attorneys, scholars and judges convinced us that each of these actors made some distinctions between good and bad witnesses; indeed, certain key scholars were identified as outstanding witnesses by many people. We were curious as to the direct grounfings of this concept; what is it that a good witness looks like, or has, or does? We proceeded to read through all the interviews with all actors, to underline and select out examples of things that were said about witness characteristics. We made copies, and present the reader with scholars' and attorneys' and judges' own words, the better to give a meaningful "feel" to the behaviors or characteristics they had identified. Thus, the chapter is liberally sprinkled with quoted material that we think gives the flavor of the issue, as identified by our informants. Now we thought we understood what was important about witnessing, what was important for an expert to do and not to do in the courtroom. Obviously, part of the issue was appearance, or illusion, and that was different than what competence lay at the root of the illusion. With this understanding in hand, we were prepared to test the extent and distribution of the problem we now understood. The more we looked, the more it began to be clear that there was not an infinite number of characteristics; on the other hand, the issue did not simply come down to personality. Rather, there were a number of things that people were able to agree to as being general characteristics. On this basis, we were able to categorize the unique statements about witness characteristics into a limited set of categories...the categories noted in Table 11.1. This essentially was a coding scheme, and comments could be fit into that scheme. Although the table actually pulled this material together, rather than having identified it at the outset, we present it at the beginning of the chapter (rather than the end) for the reader's convenience.

Another analytic approach required the identification of a problem and analytic frame ahead of time. Then, the coding and analysis were based on a long process of reading the complete transcripts of experts' interviews. For instance, the general reading of scholars' transcripts were inevitably guided by the anticipation that experts would experience conflict between the supposed neutral role of scholar and the supposed partisan role of expert witness. However, we made a concerted attempt to remain open to other sources of conflict for scholar-experts that might be more salient than the experience of role conflict, as well as to the possibility that some experts may not have experienced conflict in the courtroom.

Our thoughts about conflict for expert witnesses were altered by the data. We began with a rather simple model which assumed that experts would perceive discrepancies between the norms of the academy (social science norms) and the norms of the courtroom (legal-adversarial norms). However, informants' perceptions of normative discrepancies were significantly more complex than expected. At one level, experts noted the anticipation of discrepancies, or the general belief that they existed. At another level, they reported the actual expereince of discrepancies in the courtroom. Furthermore, some scholars reported that encounters with these discrepancies created conflict for them (role conflict), while others didn't mention any conflict. Therefore, our notion of differences between social science and legal-adversarial norms was expanded to include several separate categories of normative discrepancies.

Another instance in which the data required reorganization of our preliminary ideas occurred in the analysis of lawyers' responses to the idea of a panel. Initially, we thought all the attorneys would be opposed to this idea, since it violated the basic adversarial norms of the courtroom. However, a number of attorneys favored the panel, under certain conditions; the conditions themselves were more illuminating than general agreement/disagreement. As Chapter 14 indicates, a revised inquiry format led to the discovery of themes of negotiation in a community controversy, power and control of the courtroom, and perceptions of social science bias as relevant issues.

Some data were analyzed in order to clarify within group differences. For instance, within the group of scholars, we examined differences in how plaintiff witnesses and defense witnesses responded to various issues, or how they selected from among competing roles and normative standards (scientific vs. legal-adversarial). Other data were analyzed in order to clarify between group differences. For instance, we compared the ways lawyers and scholars experienced or evaluated certain testimony or styles of witnessing. And finally, some data were analyzed in order to triangulate any and all groups' perceptions of key issues. For instance, in trying to understand the criteria for a good witness, or the relevance of a panel as a mechanism for providing scholarly testimony, we brought all groups' perceptions to bear on the problem.

We almost always carefully checked the qualitative categorization of interview excerpts, to insure we agreed on the informants' meaning of a phrase or idea. Thus, it was unwise and dangerous to rip statements out of context, and we tried to insure the use of statements (or quoted excerpts) that were rooted in a context of similar meaning. On several occasions, moreover, we check-coded our quantitative materials, to ensure that more than one observer agreed to the placement of an actor within a given category, etc. For instance, related to the coding of experts' normative stance in the courtroom, twenty-five interviews were coded by a second coder (not associated with the study), for the normative stance experts reported adopting in the courtroom. This was perfect agreement about the reported normative stance of 24 of the 25 experts. Another reliability check was done on the coding of experts' actual normative stance as reflected in the court transcripts of their testimony. Six court transcripts were analyzed by two coders and there was perfect inter-coder agreement on the actual stance of five of the six experts.

Other details about the analytic methods we used are presented in the chapters where they are most relevant. In all chapters the names and identifying characteristics of all actors we interviewed have been omitted. In some cases, that has required us to make minor modifications in the interview transcriptions, or in the materials taken from depositions or court-transcripts. This step was taken to preserve the anonymity and confidentiality of the data, and the privileged conversations we had with informants. Sometimes, when informants discussed another scholar, a second or third party, we have included such indentification where it seemed to us to be both appropriate and a useful specification of an issue or concern. Moreover, when an actor's remarks have appeared in print (in a published article or opinion, for instance), we have not hesitated to identify the person and the source as such.

Although we have used a variety of data analysis techniques, in no case have we found that these different approaches to the data led us to competing or exclusive conclusions. They have, however, led to some different conclusions, because each method asks some different questions and finds some different problems and answers that lie in the data. Our own experience is that it has been fruitful to explore and experiment with these different inquiry modes, and these different analytic frames. The pluralism within our own staff has at times been frustrating; indeed, we have found ourselves talking past one another on occasion. But at the same time, we believe the product (this report, as well as future materials) will have been enriched considerably by the use of more than one framework. All too often, a lead investigator acts out of his or her preferred mode of inquiry and analysis, and plural analytic forms seldom are combined (or presented alongside one another) in a unitary report. While we do not claim hereby that this particular version of our findings represents a true integration of various analytic modes, it does present several different ways of approaching a common data set.

CHAPTER 6

ROLE CONFLICTS OF SOCIAL SCIENTISTS AS EXPERT WITNESSES

> A court is inherently an adversary proceeding. Scholarship is inherently not an adversary proceeding. . . There is no way you can go into a courtroom and testify without testifying on one side or the other. I'm not interested in sides. I am interested in how the world works . . . I'm not interested in advocacy but am very interested in objectivity. So, I find the court antithetical to my purposes, which is as objective an analysis as I possibly can make of how the world works.

This statement by a social scientist who was asked to testify in a school desegregation case, and refused, illustrates some of the dilemmas inherent in the role of scholar-expert witnesses. The academic sphere generally is conceived to be fundamentally different from the legal sphere, and these differences are assumed to create conflicts for academic experts. The adversarial nature and norms of the courtroom usually strain scholars' ability to remain detached and disinterested . At the same time, training in the academic norm of objectivity often makes them uncomfortable being advocates. The basic dilemma for scholar-experts is rooted in having to negotiate the incompatible norms and role demands of the academic and legal spheres.

This approach to the scholarly role in court (or other applied settings) suggests that fundamental and fixed differences between the two spheres produce conflict for applied scholars. It characterizes the spheres by static sets of mutually exclusive attributes (e.g. the policy sphere is bound by, and the academic sphere is insulated from, extra-scientific influences). We may therefore call this a "fixed differences" model[1]

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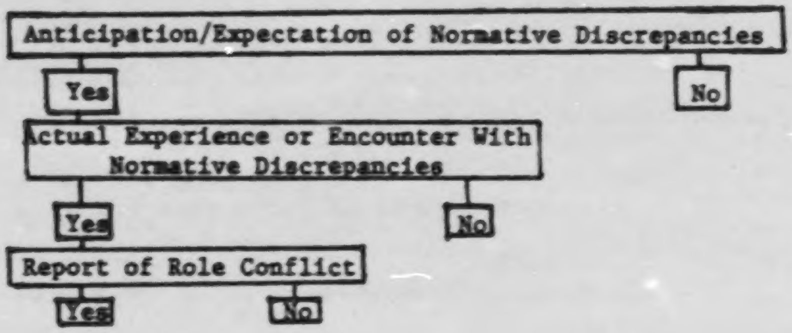
[1] The fixed differences model is similar to Caplan's (1979) two-community theory of the utilization of social science knowledge by policy-makers. Borrowing the two-community concept from C.P. Snow, Caplan found that a major explanation for the limited utilization of social science knowledge in the policy sphere was the fundamental differences between the interests, values, and vocabularies of policy-makers and social scientists. While the two-community theory relates between-sphere differences to utilization issues, the fixed differences model relates them to dilemmas experienced by scholars who participate in the policy sphere.

In this chapter we describe and analyze some of these potential conflicts in applied roles empirically. Our procedure is as follows: (1) first, we record and examine the comments of scholars who testified in court to understand the extent to which they perceived different normative patterns to exist. (2) second, we examine these scholars' interviews to understand whether the encounter with normative discrepancies actually produced role conflict. After all, it is possible these preliminary statements of the differences between legal and scientific norms are too vague and abstract, and were not actually experienced by scholars in courtroom testimony. Moreover, even if these discrepancies or differences exist, they may or may not lead to discomfort, tension or role conflict for scholars testifying in court. Thus the flow of our analysis can be diagrammed as follows:


Anticipation/Expectation of Normative Discrepancies
Yes
No
Actual Experience or Encounter With Normative Discrepancies
Yes
No
Report of Role Conflict
Yes
No

Problems in the Role of Expert Witness

The basic problem for scholar-expert witnesses appears to result from the adversarial nature and norms of the courtroom (Schwartz, 1978; Wolf, 1976; Wolfgang, 1974). As indicated in Chapter 4, the academic sphere ideally is focused on a disinterested quest for knowledge. While there have been numerous critiques of the feasibility and desirability of value-free scholarship, objectivity in the sense of caution about the impact of one's values and beliefs upon one's research stands as an ideal. In this context, some scientists argue that scholars should not enter the courtroom, and should not provide testimony in litigation. They often argue that social science evidence is "too soft", and not reliable or certain enough to be used as a basis for policy decisions. Other opponents of expert-witnessing argue that scholars should stay out of all activist arenas--not just the courtroom.

In their view, such activity damages the image of credibility and neutrality so necessary for the preservation of scientific institutions, and for the quality of science itself.

Social scientists who do engage in applied work, are under some pressure to do it in ways that are consistent with scholarly norms. Thus, with regard to testimony in courts, scientific norms generally induce scholars to present their expertise as scientists and not as advocates. Accordingly, they should not allow personal opinions or affiliation with one side of the case to bias their presentation of evidence. They are expected to testify with a balanced presentation of facts, including data that might "hurt their side." They should reflect accurately the complexity of issues and not reduce them to simplistic dichotomies between right and wrong. Qualifications about the basis, generalization and certainty of their statements should not be omitted in order to help the party they represent. Finally, their testimony should be based on scientifically verified knowledge and not on unfounded opinion or speculation. In short, social science norms guide experts to function as neutral scholars providing extra-legal data to help judges reach informed decisions.

The adversarial nature and norms of the legal arena are said to threaten experts' ability to maintain a neutral stance and adhere to social science norms (Schwartz 1978; Rist, 1978; Wolf, 1976). Traditionally, scholars are not called by the court, but by one of the parties to the litigation. They enter the courtroom on one side of the dispute, which at least structurally identifies them as partisans. In addition, they often are paid for their testimony by the side for whom they testify, creating additional pressures for loyalty and party advocacy.

Several scholars have argued that the adversarial features of the courtroom also create a structural bias in the selection of expert witnesses (Orfield, 1978; Wolf, 1976). In their view, the adversarial pressures inhibit participation by scholars who are concerned with objectivity and scientific caution. Instead, they encourage participation by strongly partisan scholars, or by those who are willing to compromise their scientific ideals for the fees associated with the role of expert. Furthermore, in their search for experts, attorneys may not necessarily seek the most competent scholars. Rather they may seek, "predictable witnesses. . .judges often see a narrow range of witnesses, strongly identified with particular policy positions" Orfield, 1978:171). This selectivity on the part of the lawyers in choosing experts, and scholars in accepting the role, stems from and in turn reinforces the adversarial pressures of the courtroom.

The legal-adversarial norms for establishing truth are another source of strain on expert witnesses' ability to adhere to social science norms. Adversarial norms are based on the presumption that the truth emerges when various litigants have presented the facts relevant to their side of the case. The impartial judiciary is expected to sift through this "market-place" of ideas to build or create a higher level version of truth. Thus, individual witnesses are not expected to present balanced or impartial statements of fact, but rather to present facts in a manner which will help advance their side's perspective. This criterion of legal advantage determines the selection of experts and the courtroom behavior that attorneys expect of them (Schwartz, 1978; Wolf, 1976; Schur, 1968; Kelly, 1965). Thus, lawyers seek clear, strong, supportive testimony from experts. Opposing data, or statements laden with qualifications, uncertainties and complexities typically are considered undesirable components of expert testimony. Though they may be consistent with social science norms, they generally do not help attorneys win the case and thus are not consistent with legal-adversarial norms. In short, legal-adversarial norms strain the neutrality of experts and induce them to be more one-sided, simplistic and unconditional than do social science norms.

Cross-examination is another strain on scholars' neutrality. It is designed to probe experts' testimony and perhaps to discredit them in order to reduce the weight of their testimony. It frequently leads scholars to defend themselves and their side, thus adopting a partisan stance, In one description of the impact of cross-examination, Williams writes:

> No witness, no matter how neutral he conceives himself to be, is immune from the feeling of participating as a combatant in a battle. . .it becomes increasingly apparent to the witness that he cannot remain neutral and he must defend himself by choosing sides (1957: 34-35).

As implied above, social science and legal-adversarial norms are not equivalent options for experts. The courtroom setting places direct pressures on experts to adopt a legal adversarial stance. Addressing this point, Pettigrew (1979) agrees that it is social scientists who must make major compromises and adjustments in court, for they are operating in a legal and not social science context. Even Wolfgang (1974), a strong advocate of experts adhering to social science norms, writes that in the courtroom these norms are filtered through a set of legal values, norms and operating procedures.

The existance of these competing normative systems, and the pressure on scholars to adopt or adapt to legal-adversarial norms,can be expected to create role conflict for scholars. Despite the pressure, scholars who have been well-trained and experienced in the scientific system cannot easily (nor perhaps should they) compromise or alter their commitment to scientific norms. Although much of the literature on the role of scholarly witnesses recognizes that adherence to social science norms is difficult, it nonetheless contends that scholars have a professional obligation to adopt such a stance (Wolf, 1976; Wolfgang, 1974; Mcgurk, 1959; Rose, 1956; Louisell, 1955; Clark, 1953). Moreover, it implicitly assumes that this obligation personally motivates scholars to adhere to social science norms as experts. This leads to the conclusion that experts face inherent role conflict and discomfort related to difficulties in adopting their preferred courtroom stance. The resultant role conflict is summarized by Schur:

> As a scientist, the sociologist is supposed to conduct objective value-free research, yet when he enters the case he must ordinarily represent one side. As a scientist, he should always note the basis for and limitations of his findings . . . When he takes on the quite different role of participant in an adversary proceeding, which principles (those of the academy or those of the courtroom) govern his behavior? (1968: 187-188).

This framework for considering the differing norms of academic and policy spheres leads to the following specific questions about scholars' roles in the courtroom:

1. What are some examples of normative discrepancies scholars perceive or encounter?

2. To what extent did experts anticipate or expect these normative discrepancies?

3. To what extent did experts actually experience or encounter these discrepancies during testimony?

4. To what extent did experts who experienced such discrepancies also experience tension, discomfort or role conflict?

The answer to the first question should help specify the issues we have been discussing, and illustrate them in the reports and data base of this study. It should give the reader some better example of the reality of these normative issues and discrepancies. Answers to the second question should provide us with an image of the ideology or analysis of the courtroom and the academy made by scholar-witnesses. Their prior analysis of the courtroom environment and its norms should begin to frame their behavior. For instance, their prior analysis led some scholars to the decision not to testify, not to wander further into this land of ambiguity, potential compromise and discomfort. Answers to the third question begin to provide a test of scholars' anticipations of the differences between these spheres of endeavor. As we noted earlier, not all anticipated consequences of testifying may actually have occurred, and experience in court did not necessarily conform to all scholars' expectations. Finally, we explore the question of how people coped with discrepancies that they did experience. Does the common assumption of role conflict, involving tension and felt discomfort, bear out in the actual experience of this group of expert witnesses? If not, we wonder, how come? If so, what then?

The Content of Normative Discrepancies

The normative discrepancies reported by scientists concerned four issues related to the courtoom: relationships with attorneys, testifying for one side of the litigation, control of one's presentation and interactions, and cross-examination. In the following discussion, the discrepancies scholars identified are underlined and numbered.

Relationships with Attorneys. Expert witnesses often have to deal with the fact that (1) their goals for their testimony differ from those of their attorneys. They may be committed to informing the judge about social science knowledge that is relevant to the issues in the case. Attorneys, on the other hand, may be interested primarily in the presentation of a version of knowledge that will help with the case. As a result, attorneys tend to be interested in expert testimony that presents broad, certain supportive evidence. They may encourage experts to (2) omit qualifications, (3) omit complexity and (4) omit opposing evidence that generally would be included in an academic presentation. Attorneys also may (5) subtly try to shape the content and style of expert testimony without considering the constraints imposed by social science norms. They also may encourage experts to (6) make statements that go beyond the data or the experts' area of specialization. These statements would be considered inappropriate in an academic context.

Testifying for one side. The courtroom is structured so that experts generally testify for one of the parties in the litigation. (7) The role of party witness may strain the neutrality of the expert. More specifically, experts may face situations where they (8) have to choose between presenting all the relevant evidence and helping their side win the case. The "whole truth", while consistent with social science norms, often does not unconditionally support one's side. Moreover, experts testifying for one party may feel pressed to (9) please their lawyers or "clients" because they are paying for experts' testimony. This may encourage testimony that is questionable by social science standards. Finally, testifying for one side may be the product of, or actually promote, strong emotional or ideological identification with that side. Such identification may prompt experts to (10) Blur the distinction between personal opinions and social science evidence in order to help their side. The maintenance of this distinction is fundamental to most interpretations of the scientific norm of objectivity.

Control of One's Courtroom Presentation. In court, experts (11) may not be able to control their presentation and interactions as they do in academic contexts. In their teaching, writing and oral reports, academics largely determine the content and breadth of their presentation. On the witness stand, their statements are constrained by the questions posed by the lawyers. They find themselves (12) unable to include relevant information and sufficiently expand their statements. This may lead to one-sided and simplistic arguments that would not be acceptable in a scholarly forum.

Cross-examination. (13) The combative nature of cross-examination may strain the neutrality of experts. Attack by opposing attorneys may provoke hostility and defensive responses by experts, increasing their partisanship and loyalty to their side and clouding their scientific neutrality. In addition, (14) cross-examining attorneys may try to rattle or confuse experts, thus reducing their ability to present material in a coherent and professional manner. Finally, the pressures and tactics of cross-examination may lead experts to (15) make statements that do not accurately reflect their data or conventional scientific wisdom. These statements reflect a clear departure from scientific standards of data presentation.

A scholar's response to these issues was coded as reflecting a normative discrepancy if it noted a difference between social science and legal-adversarial norms.

Anticipated and Experienced Normative Discrepancies

We have distinguished between scholars' expectations or anticipations that these normative discrepancies may exist or occur, and their actual experience. This is an important distinction: individuals constantly explore their environment and develop a sense of normative standards (and/or discrepancies) associated with roles they have not occupied. For example, medical students anticipate the role of a doctor long before they adopt it: this may include anticipating discrepancies between scientific and humanitarian expectations associated with the doctor's role. A lack of behavioral experience with specific roles and normative discrepancies does not preclude awareness and expectation of them. In fact, symbolic interactionists use the terms "role playing" and "taking the role of other" to suggest that the absence of such cognitive exploration and awareness makes shared understandings and interactions between individuals with different life experiences extremely difficult.

First we present some examples of statements that were coded as anticipated discrepancies:

> I was prepared for the lawyers to push my testimony further than I was willing to go as a social scientist.
>
> In court, you're not expected to qualify as you are in an academic forum.

Almost all informants (96%) expected or anticipated some of these (#1-15) discrepancies between social science and legal-adversarial norms. The mean number of anticipated discrepancies reported was 3.84, with 54 percent of the informants reporting four or more examples. The prevalence of such discrepancies suggests that the fixed differences model is more than an abstraction constructed for the purposes of this analysis. It is not a straw man, and it exists, at least in the minds eye, for most scholars who testified. Scholars appeared to implicitly adopt the model in constructing notions or expectations of fundamental between-sphere normative differences.

Actual normative discrepancies are discrepancies between social science and legal-adversarial norms that informants reported experiencing in the role of expert witness. To be coded in this category, statements about discrepancies had to be phrased in the first person and focused on experience rather than anticipation. For example,

> [In an academic forum] I frequently couch my findings and condition them with all the cautions that go into social science research. Its very difficult to present in that sort of fashion, the fashion that you would in a journal article, in the role of expert witness. Particularly in cross-examination where the adversarial situation stimulates one to omit caveats.

> Somehow [testifying] doesn't feel natural. It's not as natural as going to a professional meeting and delivering a paper. . . There, you're simply transmitting information. Theoretically that's all you're doing in court, but the adversarial process changes that to some extent.

Table 6.1 summarizes these informants' experiences of normative discrepancies, as well as their anticipations.

Table 6.1

Aggregate Difference in the Numbers of Anticipated and Experienced Normative Discrepancies

	Reporting no discrepancies	Reporting 1-3 discrepancies	Reporting 4 or more discrepancies	Mean Number
Anticipated Discrepancies	4%	42%	54%	3.84
Experienced Discrepancies	10%	75%	15%	
T Statistic		7.52		

Most informants (90%) reported experiencing as well as anticipating discrepancies. However, they reported an average 1.61 fewer experienced than anticipated discrepancies, and the T statistic indicates that this mean difference is highly significant. At the individual level of analysis, 81 percent of our informants reported experiencing fewer discrepancies than they had anticipated or believed to exist. In short, witnesses' reports illustrate that: (1) most scholars who testified both anticipated and experienced normative discrepancies; and (2) the role of expert was not laden with as many normative discrepancies as they had anticipated.

These results indicate the utility of distinguishing between assumptions about, and actual experiences of, normative discrepancies. The two appear empirically as well as conceptually distinct. Moreover, the different rates of expected and experienced discrepancies suggest that in some cases conformity with social science and legal-adversarial norms may not be as far apart in practice as they are in theory. The fixed differences model may not be quite so "fixed".

Role Conflict

The next step in our analysis was to examine the relationship between the experience of normative discrepancies and role conflict. Role conflict refers to discrepancies that created unpleasant feelings for experts; thus informants had to explicitly link tension, conflict, anxiety, frustration or similar feelings to a normative discrepancy to be coded as role conflict. The following statements are examples of comments coded in this category.

> Testifying is certainly nothing like doing research or even teaching, where you try to show both sides more clearly and forcefully than you do in court. For that reason, it's a bit uncomfortable for me.
>
> I have always had a problem in the past on cross-examination. I tend to be sort of agreeable and friendly . . . This is not a good thing to do. I meant it is an adversary proceeding and you shouldn't. If you are doing this business in order to make a point, you have to play the adversary thing. I didn't know that in the past and felt uncomfortable.
>
> I always experience a certain amount of tension in the process of testifying. The conflict is between whether I am testifying for the people who hired me or whether I am a servant of the court, and am simply supposed to answer questions and however the questions come up, the answers fall where they will.

Quite clearly all three informants mentioned they were "uncomfortable", experienced "tension" or had a "problem."

On the other hand, many experts reported they experienced discrepancies that they did not associate with conflict. If they had anticipated such conflict ahead of time, perhaps they adopted some strategy to deal with these discrepancies before entering the courtroom. That coping strategy may not have eliminated the subsequent experience of normative discrepancy, but may have reduced their impact. Perhaps, on the other hand, discrepant norms just do not consistently produce feelings of conflict.

The literature on role conflict generally assumes that once normative discrepancies are experienced, they inevitably yield subjective conflict for role inhabitants. Toby makes this point explicity: "It is obvious that an individual in a role conflict situation is uncomfortable" (1952:324). However, Sieber (1974) and Gerhardt (1973) conte that situations with highly incompatible normative expectations often do not produce conflict for the individuals involved. Stryker and Macke (1978), in a recent review article, conclude that role conflict can not be assumed on the basis of exposure to discrepant expectations, but must be demonstrated.

In order to assess this relationship, we reserve the term role conflict for normativ discrepancies that were actually experienced and reported as involving tension or discomfort.[2] Our findings about role conflict support the distinction between conflict-free and conflict-laden discrepancies. Compared to anticipated and/or experienced discrepancies, role conflict (conflict-laden experienced discrepancies) is less common. As indicated in table 6.2, half the informants (52%) reported no role conflict whatsoever.

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[2] Perhaps because of memory lapses, informants generally did not report conflict associated with anticipated discrepancies. There is no reason to assume that anticipated discrepancies are not capable of creating conflict for individuals. However, given the empirical constraints of this study, and our inability to discern this issue from retrospective interviews, we limited our operationalization of conflict to reports of discomfort associated with discrepancies that were actually experienced.

Table 6.2

To Extent to Which Normative Discrepancies Involved Role Conflict for Expert Witnesses.

	Discrepancies never involved conflict 0%	Discrepancies sometimes involved conflict 10 - 90%	Discrepancies always involved conflict 100%
# of Informants	27	13	12
% of Informants	52%	25%	23%

Obviously, many of the incompatibilities between social science and legal-adversarial norms did not involve, or at least were not reported as involving, conflict. One possibility is that individuals who anticipated discrepancies began to contemplate or adopt coping strategies and reduced actual discrepancies, or their conflict-laden nature, during subsequent role enactment. Indirect support for the existence of this (conscious or unconscious) coping strategy is provided by several informants' statements. Two experts who anticipated but experienced no role conflict commented;

> It was very clear in my mind, once I thought about it, and I was thinking about it on the way there to[testify] on the plane. I was really representing myself and I had to be very clear that I didn't say anything that I didn't absolutely know. And I had made my mind up in advance that I would never get outside my area of expertise. . .[Subsequently] my lawyers asked me to corroborate another expert's testimony on white flight. I just backed off because I didn't know anything about it. And that's indeed what I sort of thought of on the plane.
>
> I did not present opposing evidence in court as I would with an academic audience. It was okay, because it wasn't my job to do that. It was the job of the cross-examining attorney to identify and question me about evidence.

The above comments suggest that these experts dealt with anticipated discrepancies by pre-structuring their courtroom analyses and behavior to remove uncertainty and conflict from subsequent courtroom experiences. The first scholar decided quite firmly to adhere to social science norms in the courtroom, and thus did not have hard choices to make when confronted with the opportunity or press to depart from those norms. The second scholar reports an experienced discrepancy between social science and legal-adversarial norms regarding volunteering the "whole truth" in court. The lack of conflict around this discrepancy appears related to his choice to adhere to legal-adversarial norms. Since his mind was made up for these norms to take priority over social science norms, any conflict experienced in courtroom situations appears to have been reduced or eliminated.

Another expert who also anticipated discrepancies between social science and legal-adversarial norms, but reported no role conflict noted;

> I talked to people who had testified to figure out what principles they had learned from being on the stand . . .I had also attended a conference on law and social science. Before the conference I felt that I did not fundamentally understand what expert witnesses were supposed to be and what their status was, and after the conference I felt that I did. And then, sort of to solidify that, I did a bunch of reading on expert witnesses and social science and taught classes in it, just to make sure that I could explain it to other people, before I went into court.

The same respondent noted that this preparation helped him avoid conflict in the role of expert witness.

> [I experienced no conflict during cross-examination because] I was quite prepared by the time I was to testify. I was psychologically ready because of all the preparation I had done.

Finally, the one respondent who reported more conflict than he had anticipated noted;

> [Testifying] altered my conception of the role of expert witness because I had not realized before what it might involve. I only thought fleetingly about cross-examination. . .I anticipated virtually no conflict. Now that I have testified I see how damaging it could have been to me as a social scientist.

This statement suggests that in the absence of anticipated discrepancies, one is not likely to be prepared for the realities of role enactment.

The possibility that anticipated discrepancies do in fact reduce conflict has some interesting implications. Individuals could be encouraged to anticipate normative discrepancies associated with the role they play. Thus, particularly for roles that objectively are laden with discrepancies, pre-enactment training and socialization may be quite important.[3] Such preparation could focus on more than the technical aspects of the role; it could explicitly confront the discrepancies associated with it. As such, individuals might be encouraged to recognize and actively develop coping mechanisms to deal with anticipated discrepancies and potential conflicts. Traditional patterns of role preparation typically have ignored core problems, and solely have focused on the benefits of cherished statuses. Thus, young people were told about the wonders of marriage and parenthood without being informed of the sacrifices, compromises and incompatible expectations associated with both roles. Obscuring the negatives, or "over-selling" roles to future inhabitants, actually may hinder their eventual role comfort and performance.

On a broader level, another explanation for the lack of congruence between discrepancies and role conflict may be in the basic assumption of the fixed differences model. Social science and legal-adversarial norms may not be quite as discrepant as the literature or our informants assumed. Moreover, the role of expert witness may not necessarily be laden with constant conflict. Our findings challenge some traditional assumptions about the role of scholar-expert witness and raise questions about why the literature has exaggerated the differences between social science and legal-adversarial norms.[4]

One possible explanation is that the stress on clear normative differences between the academic and legal spheres is important for the maintenance of the professional ideology of the social sciences (Kalmuss, 1980). In general, professional ideologies justify the professional status of occupational groups by asserting exclusive possession of and control over a unique and valuable body of knowledge or expertise (Freidson, 1971; Daniels, 1971). Social science's claim to professional status rests on its asserted ability to generate "objective" scientific knowledge.

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[3] The process of preparation (or on-the-job training) for expert-witnesses is examined in more detail in Chapter 10.

[4] There may be a glass "half-empty/half-full" quality to this discussion. After all, in table 6.2 we reported that 23% of the expert-witnesses reported that normative discrepancies always involved conflict, and 25% reported that they sometimes involved conflict. That constitutes substantial evidence for the existence of role conflict around these normative issues. On the other hand, 52% of the witnesses reported that they experienced the discrepancies, but without any conflict at all. That, too is a substantial number. We stress the importance of these findings because of their confrontation with the standard expectation of constant conflict in the policy sphere, particularly in the courtroom. Other interpretations are, of course, possible.

To justify that status, the professional ideology maintains that scientific norms, procedures and standards which facilitate the generation of such knowledge are unique to the academic sphere. Recognition of similarities between social science and legal-adversarial norms, or reduction of the difference between academic and applied scientific settings, might challenge the unique contribution of the social sciences, and thus undermine their professional ideology. As such, the assumption of fundamental normative differences between the academic and legal spheres may serve the interest of the social science community.

On the other hand, these data support the notion that the fixed differences model is more than a "straw person". Informants clearly held general perceptions or expectations of fundamental differences between social science and legal-adversarial norms. However, the fact that they experienced fewer normative discrepancies than they anticipated, and that many of their experienced discrepancies involved no conflict, challenges the fixed differences model's predictions about scholarly participation in the policy sphere. These predictions are based on a view of the legal sphere as adversarial and the academic sphere as non-adversarial. The results may be better explained by an alternative model of applied scholarship which views the two spheres as possessing fluid and potentially overlapping characteristics. Specifically, a "dynamic model" accepts the possibility that the legal sphere can be non-adversarial and the academic sphere can be adversarial. As such, between-sphere differences and role conflict for applied scholars may be neither inevitable nor constant.

The Non-Adversarial Nature of the Legal Sphere: The Adversarial Nature of the Academic System

Despite the assumptions of the fixed differences model, the adversarial nature of the courtroom may not be constant. Rather the courtroom may be quite adversarial at some times and not so adversarial at other times. On occasions when it is not particularly adversarial, it may not represent a drastic departure from the academic sphere, and thus may not create role conflict for expert witnesses. Since cross-examination is seen as perhaps the most consistently adversarial feature of the courtroom, we will focus on variations in the combativeness of cross-examination.

Our interviews with attorneys in these cases indicate that some feel there is little utility in attempting to discredit expert testimony in cross-examination. They maintain that experts know far more than they do about the substantive and methodological issues presented, and thus do not feel that they can successfully trap experts in cross-examination. This is most often the case when scholars present clear and simple facts and figures that leave little room for dispute. As one expert commented;

> In some sense they couldn't impeach my testimony because the tables were right there and anybody could see them. All I was doing was saying these are the tables and this is what the numbers mean. By delimiting my testimony so much into observable facts, I'd given them practically no ground to go on.

Some attorneys may not utilize a particularly adversarial cross-examination when they deem the scholar's testimony is irrelevant.[5] For instance, some experts testified on minor points or on matters that were only indirectly related to the case. Opposing attorneys may have considered them less important and thus less necessary to attack than those who testified on issues that were central to the litigation. A relatively non-adversarial cross may diminish the extent to which experts experience the courtroom as fundamentally different from the academic sphere. This, in turn would reduce role conflict caused by such differences. Defining the adversarial nature of the courtroom as a variable rather than a constant permits an understanding of why role conflict is not inevitable for all expert witnesses.

Just as at times the legal arena may be non-adversarial, at times the academic sphere may be quite adversarial. Controversies between individuals or groups of scholars within the academy often escalate beyond the level of polite intellectual debate. Many of these disputes emerge from recognized and ongoing cleavages within the academic sphere including: competing theoretical orientations (consensus vs conflict theorists), competing political orientations (conservative, liberal and radical), competing professional orientations (basic vs applied scholars) and competing methodological orientations (qualitative vs quantitative researchers). These cleavages can be viewed as ongoing sources of potential ideological contention and power struggle within the academy.

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[5] Irrelevance has a tactical as well as legal meaning, and attorneys' views on these topics are explored in Chapter 9.

Academic controversies typically are aired in seminars, journals and professional meetings. Occasionally these disputes become sufficiently heated to be publicly labelled as adversarial (e.g. the controversy regarding Arthur Jensen's work on the genetic basis of intelligence, the debates as to whether academic organizations should take a public stand against the Vietnam War). In examples more directly related to the subject matter of this study, consider Kenneth Clark's response and analysis of some of the attacks social scientists made on his testimony (both the substance of his testimony and his appearance in court at all) in the Brown cases:

> Those who attempt to use the methods of social science in dealing with problems which threaten the status quo must realistically expect retaliatory attacks, direct or oblique, and must be prepared to accept the risks which this role inevitably involves (1959-60: 224).

More recently, a number of heated academic controversies have arisen over the evaluation of school desegregation programs (Armor, 1972; Pettigrew et al., 1973) and analyses of "white flight" (Orfield, 1978, 1975; Coleman, 1976, 1975; Pettigrew & Green, 1976; Rossell, 1975-1976; Farley, 1975a, 1975c). These debates surfaced in academic journals and professional meetings prior to emerging in testimony during school desegregation cases. Such "scientific disagreements" were often no less combative than a typical cross-examination in the courtroom. For example, Pettigrew et al. (1973) began a "discussion" of an article by David Armor (1972), which reported negative evaluations of busing programs and questioned the effectiveness and wisdom of court-ordered busing, with the statement;

> David Armor's, "The Evidence on Busing" presented a distorted and incomplete review of this politically charged topic.

In reply, Armor (1973) stated;

> I cannot agree with the assumptions behind this reasoning [presented in the Pettigrew discussion], with the kind of morality that it represents or with the implicit suggestion that social science should be used only when it favors the values of the social scientist.

These comments illustrate the adversarial nature of what often are framed as academic debates. This is a relatively extreme case, however, and most public disputes are more controlled and focused on scientific criteria (e.g. critiques of a researcher's assumptions, research design of data analysis). As a result, their adversarial quality remains hidden to the public, but strongly felt within the academy.

Cleavages within the academic community not only produce adversarial debates, but also may convert institutionalized procedures for peer review into adversarial events. Mechanisms such as promotion and tenure hearings, as well as reviews of grant proposals and journal articles, may be dominated by ongoing struggles between cleavages. The adversarial nature of these contests in the desegregation arena is reflected in one expert's report of a conversation with a colleague who had reviewed an article he had submitted for publication. The colleague mentioned that he had favorably reviewed the article, but that another reviewer had told him that he did not feel the evidence in the article was sufficient to support the placement of "right-wing propaganda" in the journal. The article was rejected. While these behaviors may or may not be common (as we have no way of assessing their actual occurrence), they are examples of high-level controversy in the academy.

These examples of adversarial behaviors within the academic sphere do not argue that the academic sphere is entirely adversarial, or that all its disputes or decisions reflect an underlying adversarial base. Nor does the discussion of the non-adversarial nature of cross-examination argue that the courtroom supports a social-scientific style. Rather, they are intended merely to indicate that the fixed differences model is incorrect in assuming that the academy is consistently non-adversarial. If the adversarial context of the courtroom was not a constant event, nor an entirely new experience for many informants, it would help explain why the level of role conflict was lower than suggested by the fixed differences model.

CHAPTER 7

SCIENTISTS' SELECTION OF A NORMATIVE STANCE

In Chapter 6 we indicated some of the competing normative demands that exist for scholars testifying in court. As we reported, there often are major discrepancies between legal-adversarial norms typically dominant in the courtroom, and scientific norms typically pervasive in the academic community. One of the ways in which expert witnesses can negotiate these competing role demands (and thus reduce or avoid role conflict) is to make a clear choice between them, to adopt a dominant normative stance to guide their courtroom behavior. By making a clear choice, one does not have to make a new decision every time behavior or interaction occurs. What does such a choice look like? Consider these two statements from scientists we interviewed: each reflects a choice between these alternative stances.

> Aherence to professional standards is the only thing that justifies you being in court. . .I stayed within the boundaries of a social scientific presentation in the sense that I didn't say what I said for my client's sake.

> Generally you reluctantly provide information that's helpful to the other side. To the extent that that's in conflict with your commitment to knowledge and inquiry, yes there is an inherent conflict. My style, and it's not different from any other witness I've observed in court, is to reluctantly provide information that would help the other side. You don't get trapped into dishonesty, and you don't say things that you can't live with after you leave the courtroom. You know the rules of the game. You know that you're not going to be paid to help the other side. And if you honestly believe that you're on the right side of the courtroom, you're going to provide information that will support that argument, and you're going to withold information that would help the other side.

In this chapter we investigate experts' choices of a normative stance in the courtroom. Moreover, we examine the relationship between the normative stance chosen and scholars' experience of role conflict. Given the dominance of legal-adversarial norms in the courtroom, does this make role conflict more intense for scholars who attempted to adhere to social science norms than for those who adhered to legal-adversarial norms?

Determining Normative Stance

The first step in this analysis is to identify informants' choices regarding the roles they played in court, and the ways in which they dealt with competing normative pressures. In coding for informants' normative stance in court, three kinds of statements in the interview were used: direct reports about normative stance, reported courtroom behaviors, and informants' analysis of certain of their courtroom behavior. Direct statements about normative stance involved comments like:

> Well, I'm inclined to follow the scientific norms.
> And that's what I did.
>
> I would say things on the witness stand that in my real life I was not quite sure of. But I was not engaged in a professorial dialogue. I was in the role of an expert and an expert is just not unsure. . .You omit all the qualifications one would give in the classroom or with colleagues. This is a different arena, you don't do that here.

Reported courtroom behaviors, the second indicator of normative stance, were divided between those reflecting adherence to social science norms and those reflecting adherence to legal-adversarial norms. The following reported behaviors were coded in the social science category.

1. Telling the whole truth and not omitting evidence that might harm one's side.
2. Qualifying statements in terms of generalizability, degree of certainty and the degree to which they are based on established social science knowledge.
3. Constraining one's testimony to one's area of expertise.
4. Constraining one's testimony to hard facts or data.
5. Securing approval from one's lawyers to adhere to one or more of the above norms in court, before agreeing to testify or while formulating one's testimony.

The following reported behaviors were coded as reflecting legal-adversarial norms:

1. Volunteering only the part of the truth that supports one's side.
2. Omitting opposing evidence.
3. Omitting mention of problems or flaws in one's data.
4. Scanning the data and selectively presenting the portion that most strongly supports one's side.
5. Not fully qualifying one's statements.
6. Presenting opinions or positions before one feels all the research on the issue is in.

7. Including statements that are not based on social science research or data.

8. Attempting to dodge questions, score points or impeach whatever points the opposing attorneys raise in cross-examination.

The final measure of reported normative stance included informants' analyses of some of their courtroom behaviors; their own reflections on the reasons for their actions. Two particular sets of behavioral analyses were coded: adversarial behaviors interpreted by repondents as backsliding, and social science behaviors that they interpreted as strategic.[1] The first set included reports of legal-adversarial behaviors by scholars who otherwise had adopted a social science stance. They were distinguished from typical legal-adversarial behaviors because experts reported discomfort associated with their occurrence, and labeled them as deviant due to their departure from social science norms. Informants externally attributed such backsliding behaviors to the adversarial pressures of the courtroom and not their own chosen courtroom style. Because their reactions to or analyses of these behaviors reflected general adherence to social science norms, they were coded as such. The following statements illustrate analyses of backsliding:

> I did not feel good (in a particular case) because I had pushed my data beyond its limits, because of the adversarial pressure of the courtroom. And experts become uncomfortable when their opinion, method, or conclusions are stretched too far beyond their normal standards of what is a credible scientific position.
>
> The lawyers want you to say that you're absolutely sure of statistical results. And you can never be absolutely sure. And I think the real danger is when you give in to the lawyer's desire to state them as if you were absolutely sure. I suspect that there may have been cases in which, I'm sure there were cases where, I stated things with a higher degree of certainty than I would have under other circumstances. Yeah, that tension makes me uncomfortable.

The second set of behavioral analyses involved reported social science behaviors by scholars whose other behaviors and statements reflected legal-adversarial norms. They were distinguished from regular social science behaviors because experts clearly identified them as strategic. They were not designed to adhere to social science norms, but rather to score points, gain credibility or protect oneself in court. Generally, scholars viewed those acts as voluntary and motivated by particular strategic judgments. Since the asserted purpose of these behaviors was strategic, they were coded as reflecting a legal-adversarial stance.

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[1] On the face of things, it may be hard to determine backsliding or strategic behaviors from more direct normative statements and choices. Thus, in conducting this coding procedure we utilized a contextual analysis of experts' reports, analyzing otherwise discrete comments in the context of the rest of the interview.

> The technique is to qualify and I do qualify most of the things I say. It is the extreme statement that is to be avoided. It is the extreme statements that get the speaker in difficulty in cross. And I've seen it trap very experienced witnesses.

> An expert witness isn't supposed to be an expert on the law, so if anybody asks you about the law, right away you say, "it's not up to me to deal with that question." It doesn't mean that sometimes you don't intentionally jump the boundary, but you wouldn't feel the necessity to be an expert on law. If anybodv asked you a question you didn't want to anwer, you just could exclude it. See, one of the things an expert witness becomes expert at is excluding things.

Each statement referring to normative stance in court (direct statements, reported behaviors and behavioral analyses) was coded as following social scientific or legal-adversarial norms. An index score of each informant's normative stance was computed using the following formula:

$$\text{Normative Stance} = \frac{\text{Total \# of Statements Reflecting Dominant Normative Stance}}{\text{Total \# of Statements Reflecting Normative Stances}}$$

For example, an informant who made five statements about normative stance (1 direct statement, 3 reported behaviors and 1 behavioral analysis), four of which reflected adherence to legal-adversarial norms, would have an index score of 4/5 or 80% legal-adversarial.

Table 7.1 presents the distribution of informants' normative stances. It indicates that 60% of the informants reported a totally consistent set of behaviors (36% were totally social scientific and 24% totally legal-adversarial). Moreover, about half the informants (52%) could be identified as primarily social scientific, because 75% or more of their statements fell in that category; while 34% could be identified as primarily legal-adversarial. When categories are combined in this manner, 86 percent of the informants reported a clear or primary normative stance. Only 14 percent reported approximately equal numbers of behaviors from both normative sets. Most experts, then, did choose a dominant normative set, either social science or legal-adversarial, to guide their courtroom behavior.

Table 7.1

Expert-witnesses' Adoption of Social Scientific or Legal-Adversarial Norms

Percent of Reported Behaviors indicating Adoption of Social Science (Legal-Adversarial) Norms

	100% Social Science (0% Legal-Adversarial)	75-99%	50-74%	25-49%	1-24%	0% Social Science (100% Legal-Adversarial)
Percent of Respondents	36%	16%	10%	4%	10%	24%

In a few cases, we tried to check the reliability of this choice by examining transcripts of informants' actual courtroom testimony (direct and cross-examination), to assess the relationship between reported and actual normative stance. We were able to acquire and analyze six court transcripts, three of experts who reported adherence to social science norms and three of experts who reported aherence to legal-adversarial norms. Three of these experts testified for the defense and three testified for the plaintiff.

A coding scheme was developed which categorized certain types of statements and interactions between experts and attorneys as reflecting adherence to social science norms and others as reflecting legal-adversarial norms. This scheme was the same as discussed on the preceding pages except it referred to actual dialogue and interactions, not solely to reports of actions. For example, the inclusion of methodological or substantive qualifications, the inclusion of opposing evidence or alternative conclusions and easy concession of points on cross-examination were coded as social science behaviors. On the other hand, reluctance to concede points or a tendency to be "combative" on cross-examination were coded as legal-adversarial. "Combativeness" was reflected in not answering, hedging or dodging questions posed by the cross-examining attorney, as well as by directly antagonistic responses.

The results of the analysis of courtroom transcripts indicated that scholars' reported normative stance was a reliable indicator of their actual normative stance in court. In each case, the overall stance reflected in the court transcripts was the same as the normative stance reported in the interviews. However, the court transcripts indicated that informants' reports did simplify their courtroom stance somewhat. In the interviews, they tended to omit certain complexities, to portray a higher level of consistency between their preferred stance and their behavior than existed, and to assert a level of control over their behavior that was not reflected in the transcripts. While experts did tend toward either social science or legal-adversarial norms in court, their behavior often alternated between the two. Given the multiple demands, pressures and tensions of the courtroom, such vacillation is not surprising. The observed differences between experts' reported and actual behaviors are likely a function of cognitive tendencies to filter out inconsistencies, conflict and ambivalence in the recall of past experiences, as well as of the various factors that affect openness and presentation of self in an interview setting. Despite these minor variations, the court transcripts support our use of scholars' normative stance reported in the interviews as a good indicator of their actual stance.[2]

Factors Associated with Normative Stance

In Chapter 6 we indicated that there are several structural aspects of the courtroom which strain social scientists' typical tendency to adhere to scientific norms. One of these features is the conflict setting within which adjudication occurs. More specifically, the courtroom is a place where two or more parties engage in a ritualized form of combat. The fact that most experts testify for one party to the litigation potentially threatens their neutrality at the onset. Such affiliation generally can be associated with pressures toward party loyalty and advocacy. Neutrality, although logically possible at an individual level, demands conscious and unyielding effort. The partisanship associated with testifying for one side is reflected in the following statements.

> The role of party expert and consultant to the judge are completely different. . . As a party expert, you're in the thick and thin of advocacy testifying.
>
> There's a tension between professional standards and commitments to the clients in the case because you always want to be nice to the people who have been so flattering as to ask you to testify. So there is this kind of thing.

This problem of loyalty is intensified because experts are paid for their testimony by the side they represent. Payment may yield a tendency to earn one's keep, to testify in a manner that satisfies one's employers. For example:

> You start off with the main obligation to present the most balanced account of the evidence. . .Now, that's going to be hard anyway because you get pulled into the team, one side. Now suppose that the team's paying you $10,000 to help them win their

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[2] Despite the small number of transcripts that were analyzed, we have no reason to assume that the experts whose transcripts we analyzed exhibited more consistency between their reported and actual normative stance than other experts.

> case. You get an output (testimony) under a much stronger sense not to qualify. You know you're not going to be paid to help the other side.
>
> There's a natural process that since they're paying you, there may be an unconscious tendency to slip into their side and depart a little more than you would have if you were speaking before a neutral panel somewhere.

Since almost all witnesses providing testimony appeared on behalf of one of the parties to the litigation, there is no way of examining the influence of this structural feature, per se.[3] However, Table 7.2 does examine the relationship between different party affiliations and normative stance.

Table 7.2

The Relationship Between Party Affiliation and Normative Stance

	Party Affiliation	
Normative Stance	Defense	Plaintiff
Social Science	81% (17)	31% (9)
Mixed	10% (2)	17% (5)
Legal-Adversarial	10% (2)	52% (15)
Total	100% (21)	100% (29)

$X^2 = 13.2$ $P = <.01$ $df = 2$ $N = 50$

The data indicate that defense experts were more likely to adhere to social science norms, and less likely to adhere to legal-adversarial norms, than were plaintiff experts. In fact, more than four/fifths of the defense informants reported that they adopted a social science stance. Plaintiff experts displayed considerable variation, with half adopting legal-adversarial norms and the other half divided between a social science and a mixed (social science and legal-adversarial) stance.

We have interpreted the data in Table 7.2 as supporting a relationship between party affiliation and normative stance. It is possible, however, that the observed relationship is spurious and can be attributed to other factors. One potential factor contributing to this table is the differential professional affiliations of defense and plaintiff experts. Social science and educational experts were not divided evenly between the plaintiffs and defendants. The defense employed mainly social science experts and very few adademic-based educational scientists, while the plaintiffs had a more equal distribution of social and educational scientists. The professional background of expert-witness may be quite important, because at a structural level these two disciplines endorse and reward somewhat different notions of appropriate scholarly behavior. Education is a more applied field than sociology and psychology—the dominant social science disciplines of witnesses. It focuses on a particular institution, how it operates and how it can be improved. Research efforts tend to be closely linked to the educational system's problems and process. The role of educational scientists, moreover, often does not end with the generation of knowledge in an academic setting. Concerns about the utilization and implementation of knowledge inevitably link these scholars to non-academic audiences (e.g., educational practitioners, policy-makers, parent and student groups). As several educational scientists stated:

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[3] The only exceptions to this rule would involve witnesses appearing on behalf of a court-appointed panel. In this data set there is too small a sample of such scholars, at least ones not formerly associated with a particular party, to permit coherent analysis. Other issues raised by the panel format are discussed in detail in Chapter 14.

> In order for me to practice in my field, I cannot sit in a musty library and read and publish occasional articles. My professional role is in the field and that's where I belong, if I can be of use there.
>
> The final test of your research findings is, does it work? The only test is out there in the schools.

This description of education as a discipline does not deny that individual social scientists are actively involved in the application and utilization of knowledge as well. Some obviously are. However, at the institutional level, education promotes and rewards such efforts, whereas the social sciences tend merely to tolerate them. The following statements by an educational scientist and two social scientists reflect these different patterns of institutional rewards.

> I'm terribly disappointed with social scientists in terms of their lack of help in the field of education. . .It has to do with the academic reward structure. Social scientists get no reward for involving themselves in education, except insofar as the research goes back into the social science mainstream. Then it's okay. I serve as a consultant in lots of different ways. In my system I put it on my activity reports, and I get merit increases in terms of my consultant role. We're supposed to go in for outreach and public service. Not the sociologists or psychologists.
>
> Yes, there are going to be costs of my applied work, but I'm not going to stop doing it either. . .I don't talk about it with my colleagues at the university. I simply don't share those activities with them because it has negative consequences; and that's how I handle the role conflict, just by not talking about it.

> I think those people who control our discipline, who regard themselves or are regarded as pure social scientists, think poorly of applied work. They consciously manipulate the discipline to try and keep graduate students from going in that direction. They give rewards to grad students who are in their image. This is conscious on their part.

Social scientists generally are not expected to apply their knowledge; they are expected to concentrate on the generation and dissemination of knowledge through established acadmic channels (e.g., journal articles, books, academic presentations and teaching). Utilization efforts are acceptable only insofar as they do not inhibit or take precedence over research and teaching. As a result of these disciplinary pressures, we can expect educational scholars to have more experience with, and comfort in, applied school settings. Moreover, they are more likely to be committed to engagement in applied or change efforts in the face of controversy or resistance. Thus, they should be more likely to adopt legal-adversarial norms in the courtroom.

The relationship between professional affiliation and normative stance is presented in Table 7.3. Sixty-five percent of educational scientists adopted legal-adversarial norms, and 18 percent adopted a social science stance; on the other hand, 18 percent of the social scientists adhered to social science norms and 70 percent to legal-adversarial norms. Thus, the normative stances of these two groups of scholars are virtually opposite.

Table 7.3
The Relationship Between Professional Affiliation and Normative Stance

	Professional Affiliation			
Normative Stance	Social Science		Education	
Social Science	70%	(23)	18%	(3)
Mixed	12%	(4)	18%	(3)
Legal-Adversarial	18%	(6)	65%	(11)
Total	100%	(33)	100%	(17)

$X^2 = 13.2$ p = <.001 df = 2 N = 50

So far, this discussion treats both education and social science as homogeneous professional categories. We know this is untrue: in Chapter 4 we discussed a wide range of social scientific roles in desegregation-related situations. Moreover, throughout we have indicated scholarly debates related to professional norms and role options, let alone to courtroom stance. These debates touch upon issues such as the desirability and feasibility of scientific objectivity, the role of social scientists in the policy sphere, and the relationship between advocacy and scholarship. Given the wide range of opinions on these issues, it is simplistic to assume that because an expert is a social scientist his or her conception of acceptable professional behavior will lead to adoption of a social science stance in court. To investigate this heterogeneity, we developed a measure of applied role conception, ways in which scholarly behavior in the applied arena can be more or less activist in orientation.

As indicated in Chapter 4, the most traditional form of applied social science, or scholarly intervention, involves doing research on applied issues, but only disseminating the findings to academic audiences. Interested policy makers or other constituencies have to find out about and obtain the research on their own. If this is intervention at all it is relatively passive in nature. Other passive intervention might involve direct dissemination of research findings to policy-makers and interested groups. This is still relatively passive, since scholars can conceive of their efforts as merely delivering information to decision-makers. Openly making recommendations based on research findings would involve more active intervention in the policy process. The most active form of intervention would involve scholars in explicit attempts to use their skills and knowledge to create, implement or resist change.

The traditional style of relatively passive intervention of scholars in the policy arena more closely approximates Weber's citizen-scholar distinction than does more active intervention. Some informants stated their role conceptions in this context, as follows:

> I think it is possible to do applied research without being an advocate. Being an advocate is something else altogether. To some degree, I would argue that a researcher is only there to put his research out. That is not to say he can't have any other roles, such as advocate. But in the role of researcher, he is there to put his research out and have somebody else pick it up.

> As social scientists become advocates and present their opinions as science, that compromises the credibility of science.

> I'm uncomfortable with social scientists endorsing particular solutions to social problems. They should generate knowledge and then they may apply it to a particular problem and real-world situation. If a solution is suggested from that application, they should present their work and the suggested solution to policy-makers. They should not advocate for that solution. They should merely present it as part of the knowledge package they have generated.

These informants do not consider active intervention and advocacy an appropriate form of scholarly activity. Rather, they view the scholar's task in the applied arena as sharing expertise and transmitting information to decision-makers. They encourage attempts to separate personal opinions and values from the intervention process--consistent with the Weberian ideal.

In contrast, active intervention in the policy sphere generally involves advocacy, or attempts to implement a given policy or policy direction. It generally involves an overt relationship between personal beliefs and applied endeavors. The following informants' statements illustrate applied role conceptions involving active intervention.

> My orientation to social science was always based on the idea that knowing something places on the individual a responsibility for its application. Being a social scientist placed on me the responsibility of utilizing that knowledge in a way to achieve certain kinds of goals. The goals must be consistent with my own values and beliefs. I use my social science knowledge in ways to further my own values.
>
> Social science is active, it has effects when it is committed and engaged, when it is serving some actor or set of actors in a social interaction. Social science can do perfectly good work in the service of some cause. . .The way social science knowledge finds its way into action is when people care deeply about it and when people care deeply about things, they're inevitably partisan.
>
> Social scientists have a responsibility to use their knowledge to make certain kinds of changes. The more important an issue is to the social scientist, the more responsibility he has to utilize this knowledge in the area.

Scholars who endorse active intervention in the policy arena argue that their values guide their work. They use their skills and expertise to further those values consistent with their scholarly findings. In sum, they reject the citizen-scholar distinction and accept advocacy as an inevitable part of the applied scientist's role.

In order to examine these distinctions in the data, we coded each interview in terms of statements reflecting positive or negative views of an active or advocate style of intervention. Statements coded as reflecting an activist role conception had to express one or more of the following views:

- endorsement of active intervention in the policy sphere
- endorsement of advocacy as appropriate scholarly behavior
- endorsement of a direct relationship between personal values and scholarly endeavors.

Informants who did not express these views were coded in the non-activist category.[4]

Table 7.4 presents the relationship between professional affiliation and applied role conception among plaintiff experts. As expected, educators tended toward an activist role conception and social scientists toward non-activism. However, there was substantial variation in the applied role conception of social scientists, reflecting the fact that professional affiliation is not the sole determinant of role conception.

Table 7.4

The Relationship Between Applied Role Conception and Professional Affiliation Among Plaintiff Experts.[5]

Applied Role Conception	Professional Affiliation Social Science		Education	
Activist	35%	(6)	80%	(8)
Non-Activist	65%	(11)	20%	(2)
Total	100%	(17)	100%	(10)

$X^2 = 5.04$ $p = < .02$ df = 1 N = 27

Thus, professional affiliation and party affiliation are associated with experts' choice of normative stance. Moreover, applied role conception appears to mediate the relationship between professional affiliation and normative stance. Plaintiff social scientists who endorsed a non-activist role conception adhered to social science norms in court. Those who endorsed an activist role conception adhered to legal-adversarial norms in court.

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[4] These informants did not necessarily assume a totally anti-activist role conception. Rather, two alternative patterns emerged; direct opposition and ambivalence. Direct opposition involved statements endorsing the citizen-scholar distinction and specifying that applied efforts should not involve advocacy, as indicated in earlier quotes. In addition, however, some experts expressed ambivalence toward an activist role. This was reflected in statements that labeled the relationship between personal values and applied efforts as problematic, as well as those that attempted to combine various components of an activist and non-activist role.

[5] Since so few defense experts adopted a legal-adversarial stance, there is no variation to explore on this dimension. Thus, this table is limited to plaintiff scholars, for whom applied role conception might have helped explicate variation in normative stance. Two plaintiff educators were eliminated from this analysis because their applied role conceptions did not correspond with either of the code categories.

Normative Stance and Role Conflict

It is consistent with the literature on role conflict to suggest that part of the dilemma scholars face in the courtroom is a result of their own normative ambiguity or unclarity. If they are unknowledgeable about courtroom process, and about the challenge to their scholarly roles that lies therein, they will be especially vulnerable to role conflict. This view suggests that scholars who have figured these problems out ahead of time, and/or who have adopted a clear normative stance, should experience less role conflict than those who have an inconsistent or mixed stance.

Clearly many scholars decided upon a normative stance prior to the actual courtroom experience. They thought about the issues and, as indicated in Chapter 6, perceived or anticipated discrepancies between social scientific and legal-adversarial norms.[6] In fact, 53% of all informants indicated that they selected the set of norms to which they would adhere in court ahead of time. The pre-selection process is illustrated by the following statements:

> I feel that many witnesses are drawn out beyond their depth and that the lawyer pushes them to make statements with greater certainty than they really feel they know, and they get sucked up in it. I was afraid of getting sucked into that, so I thought it was very wise to stake out my ground. . .(I told the lawyers) that I had some relevant data and was willing to make some fairly strong statements in that area. But there were many other issues which surrounded the case that I did not feel that I knew more about than other people and I was not willing to extend beyond what I thought I knew.
>
> I understood the partisan nature of the courtroom and I realized that I would be on the stand arguing for a position without also presenting evidence that might be contrary to my case or side. But you see, that didn't bother me, because I knew that the other side was also doing that.

These statements reflect a process of pre-courtroom normative commitment based on the anticipation of discrepancies.

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[6] As we indicated in that Chapter, however, not all such anticipations were accurate. Many scholars anticipated more normative discrepancy than they actually experienced. On either basis their anticipations may have prepared them to make clear choices.

Some informants directly linked their normative commitments to the problem of role conflict in court, and to their desire to avoid such conflict. For example:

> I experienced no role conflict because I did what I told myself I would, and that is restrict myself to statements on which there was evidence.
>
> My thoughts about role conflict helped me define my role. . . I defined my role very narrowly to avoid such conflict.
>
> I think that a lot of the conflict said to be associated with social scientists participating in the courtroom neglects the fact that the courtroom is structured quite differently. And that it is not the role of the witness to define the case, to call attention to everything that could possibly be said about a subject. . .I guess I accepted the idea that I am serving one side and that resolved potential conflicts.

These statements support the coping strategy suggested above, in relating the selection of a particular normative stance to the avoidance of role conflict. Unfortunately, the small number of social scientists we categorized in a mixed stance (see Table 7.1) did not permit more quantitative analyses of any differences between those experts adopting a mixed stance or a clear stance (either social scientific or legal-adversarial).

In addition to the possibility that clear choice itself reduces role conflict, we might expect that the adversarial nature of the courtroom would make role conflict more likely among experts who adhere to social science norms than among those who adhere to legal-adversarial norms. Table 7.5 indicates that significantly fewer "legal-adversarial" than "social science" experts reported role conflict.

Table 7.5
The Relationship Between Normative Stance
and Role Conflict

	Normative Stance[7]		
Role Conflict	Social Science	Mixed	Legal Adversarial
Present	62% (16)	71% (5)	21% (4)
Absent	38% (10)	29% (2)	79% (15)
Total	100% (26)	100% (7)	100% (19)

$X^2 = 8.97$ $p = < .01$ N = 52

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[7] Experts with a social science and mixed normative stance were combined to compute the chi square statistic. Thus the analysis compares the prevalence of role conflict of experts making social science and mixed choices to its prevalence among experts choosing legal-adversarial norms. If only social science and legal-adversarial choices are compared, the chi square statistic is still significant but at a lower level of probability ($X^2 = 7.35$, $p = < .05$).

While we had no direct measure of the intensity or magnitude of role conflict, we did have a count of the number of times role conflict was reported by each informant. The mean number of conflicts mentioned was .26 among experts choosing a "legal-adversarial" stance, and 1.3 among experts choosing a "social science" stance. Thus, in the aggregate, a legal-adversarial stance appears to be associated with significantly less role conflict than a social science stance. However, even the relationship between a social science stance and role conflict was not totally clear-cut. Nearly forty percent of the informants who adopted a social science stance reported no role conflict whatsoever.

Despite potential ambiguities in the data, it appears that the adversarial nature of the courtroom makes a social science stance more difficult to adopt and maintain, and thus a less successful coping strategy (at least for reducing conflict), than a legal-adversarial stance. Although the realities of the courtroom may indeed make any preconceived normative stance difficult to sustain, the problems associated with a social science stance are much greater than those associated with a legal-adversarial stance. Thus, it is not merely the adoption of a clear normative stance that eases role conflict. Rather, conflict apparently is reduced also by accomodation to the realities of the legal arena and adhering to legal-adversarial norms in court.[8]

This brief discussion illustrates the nature of the choices scholars made between competing norms for their courtroom behavior. The data indicate the inadequacies of the argument that either social science or legal-adversarial norms should be equally effective at reducing role conflict. It does not appear that a clear choice between competing norms helps avoid conflict, but this possibility could not be tested fully with these data. On the other hand, it is quite clear that certain choices avoid conflict more effectively than others. The nature of the courtroom makes adherence to social science norms difficult, which strains their utility as a coping technique. Moreover, since legal-adversarial norms are suited to the courtroom, they should raise minimal adherence problems and be effective at reducing role conflict. Experts who elected to follow legal-adversarial norms (for whatever reasons), experienced less role conflict than those experts following social scientific norms. In general, it appears that plaintiff witnesses adhered to legal-adversarial norms more often than did defense witnesses. Moreover, educational scientists adhered to legal-adversarial norms more often than did social scientists. The interaction of these two factors, when coupled with considerations of appropriate behavior in an applied setting (activist vs non-activist applied role), helped untangle the problems and effects of normative choice.

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[8] This discussion should not be interpreted as implying such a choice (and potential comfort) is good, wise, preferred by the authors, etc. It merely seems to be what the interview data indicate about role conflict.

CHAPTER 8

POLITICAL CONFLICT IN PROVIDING EXPERT TESTIMONY

We have seen that experts tended to adopt a dominant normative stance in court. Moreover, we have examined some of the reasons why some experts adopted social science norms and others adopted legal-adversarial norms. What are other determinants of experts' courtroom role stance? One factor reported in the interviews is the political pressure or conflict arising from the battle between litigants. Many scholars experienced such political conflicts, and they appeared to be related to the side of the litigation for which they testified. Unlike role conflict, political conflict is not related to differences between the academic and legal spheres. Rather, it results from disparities between scholars' political stance and that of the party for whom they testify, or their professional community. *Party* conflict results from a perceived disparity between scholars' own views about desegregation and those ascribed to the party for whom they testify. *Professional* conflict results form the perception that their party affiliation is negatively sanctioned by their professional community. Interestingly, both forms are more prevalent among defense than plaintiff experts. How and why does this occur? These are the issue explored in this chapter.[1]

Party Conflict

To understand the source of party conflict we must examine the liberal frame of school desegregation.[2] Brown, et al. supported two core liberal values; racial equality and educational opportunity. In terms of the former, liberals viewed Brown as an endorsement of the notion of "simple justice," the equality of *all* people before the law. Historically, liberals have viewed education as the grand equalizer of societal inequities. In the tradition of a liberal consensus, education was seen to provide tools for all students to fulfill their potential and to make career choices unencumbered by background constraints. Liberals argued that since blacks were not intellectually inferior to whites, the reason they were in the lower strata of society was because they did not have equal educational opportunities. Brown was expected to remedy that and potentially to foster equality in economic and occupational, as well as educational arenas.

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[1] In Chapter 4 we discussed some of these issues, especially those related to professional conflict, as part of a series of dilemmas scholars face.

[2] A more indepth presentation of the ideology underlying the liberal consensus on school desegregation is developed in Chapter 1. There is also a conservative frame on school desegregation which emphasizes the following concerns: states' rights, individual rights, and the sanctity of the neighborhood school (Glazer, 1972; Gregor, 1963; Van den Haag, 1960). As noted in Chapter 1, although these may be dominant frameworks, they are not the only ones: black power advocates, radicals and others also have distinct interpretations of the history and current reality of desegregation and race relations.

Liberal reaction to Brown cast the plaintiffs as right and the defendants as wrong. Plaintiffs, in attempting to desegregate schools, were seen to represent the core values of American society. On the other hand, defendants, in supporting state-mandated segregation, were seen to represent white supremacy and racism. Although 26 years have passed, the political legacy of this alignment in Brown still exists. Plaintiffs continue to battle against de jure and de facto desegregation in the South and North. School boards still oppose desegregation in their cities. Thus, the liberal frame of plaintiffs pursuing a socially and politically commendable goal which defendants would like to obstruct, is still in place.

This categorization of the parties in school desegregation cases can be expected to create conflict for liberal scholars who testify for the defense. While plaintiff experts can view their party affiliation as a reflection of their liberal predispositions, liberal defense experts may view their affiliation as inconsistent with their political ideology. They may see themselves as testifying on the "wrong" side and thus experience personal conflict.

How pervasive is the liberal frame of desegregation within the academy? It is hard to know for sure, but since World War II, surveys of the faculties of U.S. colleges and universities show them generally to hold liberal political attitudes (Noll and Rossi, 1966). Ladd and Lipset (1975) present data from the late 1960's and early 1970's, indicating that faculty are more liberal than the general public on issues such as the Vietnam War, civil rights, campus unrest, presidential preferences and general political ideology. Particularly relevant to our concerns is the finding that faculty are more supportive of busing to achieve racial integration of public schools than is the general public (Ladd & Lipset, 1975:33). In addition to being more liberal than the general public, social scientists tend to be more liberal than other academic fields of study. Since the bulk of respondents in this study are social scientists, we can expect the majority of them to tend to be liberal (although caution must be applied whenever individual level predictions are made from aggregate data).

There was no interview question which directly assessed whether respondents experienced political conflict related to their party alignment. Rather, such conflict was coded as present when experts spontaneously volunteered statements of ambivalence, discomfort or conflict related to perceived disparities between their political views and those of the party they represented.[3] These comments were most frequently volunteered in response to the interview question, "Did the decision (about whether to testify) generate any conflict for you." The following statements from defense experts were coded as reflecting party conflict.

> There was some sense of ideological conflict because I had always identified myself as a liberal and I was testifying on behalf of school boards who were generally pointed to as the culprits in these things.
>
> I was in conflict because the party on the other side was the NAACP and I had been a member of that organization. I felt there but for the grace of the evidence go I, on the other side. And it was disconcerting. . .I approached it with trepidation because of my liberal leanings.
>
> At some levels I understood that I was entering the case on the side of the school district, who was regarded by many liberal and black organizations as foot-dragging, basically racist, had committed great crimes against black children. It began to hit me how ironic I should land up on this side rather than on the other side.
>
> I was conflicted about testifying for the school board because I'm generally in favor of desegregation.

These defense experts appear to have adopted the liberal frame of school desegregation. They describe their own political stance as similar to that of plaintiff groups, liberal and pro-civil rights. On the other hand, they label school boards as conservative and perhaps racist. The perceived disparity between their own political orientation and the one they ascribe to the party they represent is the source of their conflict.

Table 8.1 presents aggregate data on the relationship between party conflict and party affiliation. As expected, defense experts reported significantly more of this form of political conflict than plaintiff experts.

Table 8.1

The Relationship Between Party Affiliation and Party Conflict

Party Conflict	Party Affiliation Defense	Party Affiliation Plaintiff
Present	62% (13)	14% (4)
Absent	38% (8)	86% (25)
Total	100% (21)	100% (29)

$X^2 = 17.17$ p = <.001 df = 1 N = 50

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[3] About one third of our informants were coded as experiencing party conflict. It is possible that we underestimated the prevalence of party conflict, since some experts who experienced such conflict may not have been coded as such, because they made no mention of it.

However, there also were four plaintiff experts who reported party conflict and eight defense experts who did not. If our line of argument holds, we would expect both of these "deviant" groups to reject the liberal frame of desegregation.

Qualitative analysis of the interviews of the four plaintiff experts who experienced party conflict indicates that they all were ambivalent about the liberal frame of desegregation. Their attitudes, which were more cautious or negative than most other plaintiff witnesses, are reflected in the following statements.

> School desegregation is from my perspective extraordinarily complex and fraught with ambiguities. Whether it's beneficial, the conditions under which it can be beneficial, whether these conditions can be realized, in simple terms, whether it's a good or bad thing and I can't answer that. The school board isn't the side I generally favor in school desegregation cases. But the government side isn't something I can enthusiastically support either.
>
> . . .(When I first got involved with school desegregation) I had a very naive belief in the power of public schools to change children. I also had a rather naive view of the public school system. I regarded it as a monolithic evil and didn't really think too much beyond that. When I began, I didn't understand the terrible dilemmas that were involved for black parents and kids and for white parents and kids in something like desegregation.

These plaintiff experts have come to view desegregation as an increasingly complex issue. They no longer view it and its proponents in unconditionally positive terms, as the answer to a liberal analysis of the problems of race and education. As such, they experience some ambivalence about testifying for plaintiff groups who continue to view desegregation as unconditionally positive, and the contest in terms of good and evil.

Three of the eight defense experts who did not experience party conflict also questioned the liberal frame of desegregation. Their questioning did not produce merely ambivalence, however: rather, it tended to produce a stronger rejection of the liberal frame.

> I had decided that busing wasn't working and that it was on balance far more negative than positive. I thought that the pro-busing advocates had issues to deal with in court. The prospect of some modest gains for blacks was real enough, but the bulk of the difference in achievement was not going to go away because of the busing. And this needed to be said. I also had decided that the manner of support of busing adopted by some had become quite insulting to blacks.

> I testified for one side because it so happened that I'd written and come to a position which it turned out helped them. . .I'd felt that the remedies designed in these cases were not good remedies and therefore it was pointless to prove liability of this type. Then they would start moving everybody around and one third of the whites would leave and it would be a big mess. That was their (the plaintiff's) position. I thought they were wrong.

Since party conflict for defense experts is rooted in ambivalence about rejecting the liberal frame of desegregation, these defense experts, who unambibuously rejected that frame, had no basis for conflict.

The other five defense experts who reported no party conflict neither explicitly rejected nor endorsed the liberal frame of desegregation. They expressed no reaction to their party affiliation whatsoever. Instead, they contended that their feelings about desegregation or the party for whom they testified were made irrelevant by their professional responsibility to disseminate data to any requesting party. Their views are represented below.

> I regard it as a duty of anyone who has some sort of expertise in the field if he's asked to appear before a court to do so. You become an expert ultimately to make your expertise or knowledge available.
>
> My personal beliefs and how they relate to the position of the people asking me to testify is not a relevant factor in my decision.
>
> I viewed myself as providing technical scientific information to people who would have to make political decisions. I was an impartial advisor and my personal beliefs were irrelevant to my testifying.

These respondents appear to have experienced no party conflict because they did not contemplate the fit between their personal beliefs and those of the party they represented as a problem.

A final indicator of the relationship between party affiliation and party conflict was the differential responses of plaintiff and defense experts to the interview question, "Would you testify for the other side if asked?" Since the liberal frame of desegregation positively evaluates the plaintiffs and negatively evaluates the defendants, for plaintiff experts to change sides would represent moving from the "right" to the "wrong" side. Their basic comfort with their party affiliation, combined with their negative feelings about school boards, should make them relatively reluctant to answer the above question in the affirmative. Their reluctance to change sides is illustrated in the following statements.

> I have not lost my sense about how American society is lined up. The defendant groups are on the other side.
>
> I don't think that (testifying for the defense) would be a very constructive thing to do. . .I just wouldn't put aside everything else I had to do and go to work for somebody who was trying to make the cities segregated.
>
> I testify because I believe in the casue of equal educational opportunity. I believe that testifying on the other side would retard that cause. I don't want to have any part of that.

On the other hand, for defense experts to change sides represents moving from the "wrong" to the "right" side. Their conflicted party affiliation, combined with their respect for plaintiff groups, should make them quite willing to testify for the other side. One respondent commented,

> The fact that the NAACP happens to be on the other side of this makes it easy for me to say that I'd be willing to testify for the other side.

The aggregate data supports this analysis as well. All of the defense experts were willing to testify for the other side, whereas only 55% of the plaintiff experts reported such willingness, the remaining plaintiff experts said that they would decline testifying for the defense.

It might be argued that the willingness to change sides also could be seen as a variant of the decision to select either social scientific or legal-adversarial norms to govern one's own behavior. For instance, experts adhering to legal adversarial norms should be less willing to act neutrally, and to change sides; experts adhering to scientific norms should be more willing to disseminate their knowledge to any and all parties. The concentration of adherents of social science norms among defense witnesses makes this disaggregation impossible for these party witnesses. Among plaintiff experts, where there is a split in adherence to different normative patterns, there is no discernable trend. Thus, as far as we can tell, party affiliation and the political pressures it apparently brings is more potent than normative choice in determining whether experts will be willing to testify for the other side.

Professional Conflict

Professional conflict arises from the expectation or experience of negative professional consequences associated with one's party affiliation. Political conflict at this level is not necessarily related to party conflict; it does not develop because experts feel ambivalent about their party affiliation. Instead, it emerges when scholars feel that their colleagues disapprove of their party affiliation and will or do express that disapproval in material and status sanctions. Material sanctions may include reduced employment, funding and publishing opportunites. Status sanctions include negative labels associated with one's party affiliation and diminished prestige within the professional community.

Why should party affiliation be a source of sanction within the academic community? One explanation is that the community's aggregate trend toward liberal political attitudes creates a norm or implicit assumption of "liberalness". This norm induces the negative sanctioning of scholars whose attitudes, research findings or general scholarly activities do not support the preferred liberal stance. Several scholars have noted that pressure, censorship and suppression have all been applied to academics whose work is not consistent with the assumed liberal posture of the academic community (Rescher, 1976; Cronbach, 1976).[4]

In Chapter 4 we argued that scientists who deviate from traditional academic norms to couduct applied social science, or more importantly, applied scientists who depart too far from acceptable notions of applied work, are likely to be sanctioned negatively by their colleagues. In that context, the issues appeared not to focus on substance, per se, but to the professional politics of science. Here, the issues are political with a capital P: ideology about public affairs, not about the role of the profession, are the foremost issues at stake. In both cases, a liberal scholarly orthodoxy is responding to deviance or challenges to core norms and values.

Two interview questions generated statements about professional conflict. "Have you had any disagreements with or criticisms from professional colleagues about the propriety or wisdom of testifying?" And "Has testifying had any effect on your professional career, positive or negative?"[5] For a response to be coded as reflecting professional conflict it had to contain at least one of the following:

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[4] In Chapter 6 we discussed the presence of considerable controversy within the academy, especially on race related issues.

[5] In this data set, our only handle on these issues is scholars' self-reports of effects or consequences. While these reports may at times be self-serving, and the result of perceptual distortions, any pattern is of immediate interest. Indirect support for this phenomenon also is found in Chapter 9, where we report attorneys' perceptions of their difficulties in securing defense witnesses—because of the general academy's presumed or actual stance.

1. The anticipation or perception of being negatively labeled by one's colleagues or generally having lost status in one's professional community because of one's party affiliation.

2. The anticipation or perception of diminished employment, funding or publication opportunites due to one's party affiliation.

3. The perception that other experts who testified on one's side had been labeled, lost status or suffered material sanctions because of their party affiliation.

Informants who did not mention any of the above consequences of party affiliation were coded as reporting no professional conflict.

Some examples of statements which indicate professional conflict include:

> You know there's a sense in which it's a motherhood, apple pie, American flag issue among most social scientists. I think it's professionally very difficult to take a position that could be seen to be less than perfectly liberal.
>
> There have been professional conflicts in the sense of colleagues being aghast at the fact that I would testify against what was at one time regarded as the only wise and true position. This has been a very strong conflict.
>
> I would be willing to bet that in terms of politics of funding, I would be looked at with less favor than someone who testified on the other side.
>
> This testimony made me a controversial person and probably deprived me of a number of (professional) opportunities. The other side makes it quite clear that they regard any testimony contrary to their views not as scientific disagreement, but as a form of disloyalty.

Table 8.2 presents data supporting the expectation that professional conflict was sustantially more prevalent amont defense than among plaintiff experts.

Table 8.2

The Relationship Between Party Affiliation and Professional Conflict

	Party Affiliation			
Professional Conflict	Defense		Plaintiff	
Present	71%	(15)	14%	(4)
Absent	29%	(6)	86%	(25)
Total	100%	(21)	100%	(29)

X^2 = 19.72 p = <.001 df = 1 N =50

As we indicated earlier, general survey data shows substantial variation in the aggregate political stances of different academic disciplines. In terms of the two disciplines represented in this study, social science and education, they indicate that the former tends to be more liberal. On a Liberalism-Conservatism Scale from the 1969 Carnegie Study of American Academics, social scientists rated consistently liberal, with 44 percent more liberal than conservative social scientists.[6] Educational scientists tended to be more evenly split between conservatives and liberals, with only 16 percent more educators rated as conservative than as liberal. These data indicate that social science may be classified as a relatively liberal discipline, whereas education may be more middle of the road, leaning toward conservatism.

Our argument suggests that the social sciences might negatively sanction defense scholars, but not plaintiff scholars, in school cases. Education should less often sanction scholars for their party affiliation, but given the slight conservative thrust of the discipline, any santioning that does occur might be focused on plaintiff experts.[7] Table 8.3 provides some support for these expectations, despite the small numbers of informants in many of the cells. Among defense experts, 88 percent of the social scientists experienced professional conflict, whereas only 20 percent of the educational scientist did so. Among plaintiff scholars, only 5 percent of the social scientists reported such conflict, while 30 percent of the educational scientists did so. Moreover, three of the four plaintiff experts who experienced professional conflict were educational scientists. Finally, four of the six defense experts who reported no such conflict were educational scholars. Thus, the relationship between party affiliation and professional conflict appears to be specified by the overall political stance of experts' discipline.

Table 8.3

The Relationship Between Party Affiliation
Professional Affiliation and Professional Conflict

	Party Affiliation							
	Defense				Plaintiffs			
Professional Conflict	Social Scientists		Educational Scientists		Social Scientists		Educational Scientists	
Present	88%	(14)	20%	(1)	5%	(1)	30%	(3)
Absent	12%	(2)	80%	(4)	95%	(18)	70%	(7)
Total	100%	(16)	100%	(5)	100%	(19)	100%	(10)
N = 50								

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[6] This scale, as reported in Ladd & Lipset (1975), combined attitudes toward four major social issues (Vietnam War, Legalization of marijuana, causes of Negro riots, and busing to achieve school integration) with faculty members' self-categorization of their political ideology.

[7] By itself, professional affiliation does not demonstrate a strong relationship with professional conflict, although educational scientists report professional conflict somewhat less often than social scientists.

Although these findings have been explained in terms of the different political orientations of the two disciplines, they also may be a partial function of between-discipline differences in the status of applied scholarship. In a similar discussion in Chapter 7, we indicated that education is an applied field which endorses and rewards scholarly participation in the policy sphere. As such, it may be accustomed to the fact that such involvement links scholars to different sides of controversial issues. Since the social sciences are less supportive of applied scholarship in general, factors such as party affiliation may be important determinants of the discipline's willingness to tolerate particular applied efforts. Affiliations with "acceptable" (liberal) parties may increase such tolerance, while affiliations with "unacceptable" (e.g., conservative, radical) parties may have the opposite effect. To combine these themes, the prevalence of professional party conflict among defense social scientists may be explained both by the liberal political orientation of the social sciences and the low status of applied scholarship within these disciplines.

Testimony in the Face of Political Conflict: Strategies for Reducing Conflict

The data indicate that defense more than plaintiff experts faced various forms of political conflict. If defense experts were uncomfortable with, or anticipated, party conflicts and career costs for their particular party affiliations, how did they deal with these political conflicts? Why did they testify in the face of these apparent pressures? An examination of how defense experts dealt with these conflicts revealed two major coping strategies or justifications for these actions. The first involved arguments in support of party affiliation that were deemed more important than the personal discomfort or professional consequences associated with testifying for the defense: we term these "higher-order justifications." The second involved distinguishing the plaintiff and defence groups in their particular case(s) from the larger categories of liberal plaintiffs and conservative defendants: we call these "differentiations."

Higher Order Justifications

The higher-order justifications employed by defense experts added purpose and meaning to their party affiliations, and thus potentially eased party conflict. In particular, these experts raised two critical professional obligations; to disseminate data neutrally, and to use data to inform public policy.[8] Neutral dissemination refers to the transmission of any data generated according to the established cannons of scientific research, whether or not they support the researcher's (or the research community's) value preferences. In this view, experts' feelings about defendant school boards should not deter them from testifying. Similarly, anticipation of negative professional consequences should not override their responsibility to respond affirmatively to school board requests for testimony.

Forty-eight percent of defense respondents described their party affiliation in terms of the scientific ideal of neutral dissemination. The following statements are illustrative of this trend.

> As a scientist I feel obligated to tell anybody what the facts are. . . If you're asked to testify and you're an expert on a certain question you should testify for anybody.
>
> If my work indicated that desegregation was a bad social policy, I would present that, even though I am supportive of desegregation, I think that the basis of a social science expert in court is their application of scientific techniques to understanding the phenomena and not their ideology to understanding phenomena.
>
> I do not think that it is for me (as a scholar) to say that this will have harmful social consequences, therefore even though it is true I will withhold it. If we proceed in that way, the scholar would be a political manipulator instead of a witness.

Some defense experts explicitly related the principle of neutral dissemination to professional conflict. They contended that they were professionally bound to disseminnate data to school boards, even if such a party affiliation was negatively sanctioned by their colleagues.

> Ideologically, there is no question in my mind that if I have some data, I ought to report it. I'd feel pressured to do that no matter what the professional costs were.
>
> I think it's an obligation of a scientist to testify to the truth whatever the career consequences.

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[8] Merton (1957) describes similar types of conflict and coping mechanisms in his discussio of intellectuals employed in public bureaucracies. He contends that such intellectuals often are asked to implement or endorse policies that are not consistent with their own judgments or values. They can respond in three different ways: a) accomodate to the values of the policy-maker (implement the policy); b) seek to alter the policy-maker's values (change the policy); c) dissociate their own values from those of the policy maker's by regarding their function as purely technical and without value implications (adopt a "technical role" and implement the policy). Merton argues that the last response is most common because it is compatible with and supported by the scholarly norm of neutrality. Thus, adopting a role of disinterested technician permits intellectuals to retain their personal and professional integrity while participating in public programs and policy that are contrary to their values. This may be similar to the defense experts' use of neutral dissemination to justify their party affiliation. In Chapters 1 & 4, we argued that such actions are not neutral in their outcomes, given the structure of knowledge-using systems and the politics of policy-makers. However, they may feel neutral to the scholar adopting a consensus or individual view of the policy system.

These informants' comments imply that "reporting data" and "testifying to the truth" may involve professional costs. Obviously, they feel that the academic community does not conform to its asserted stance of non-partisanship, and that it (or some particularly vocal members or sub-groups) penalizes some applied efforts and not others.

A related justification used by defense experts was the professional obligation to inform public policy-makers about their findings. If it is argued that intelligent policy can only evolve from consideration of all of the facts, scientists are required to present any relevant data to policy-makers. Even if the data do not support the researcher's (or her professional community's) immediate policy preferences, over time they can be expected to help yield sensible public policy. For example:

> However the data turn out, they should be used to guide policy intelligently.
>
> I had a professional responsibility to get involved once I concluded (the plaintiff's desegregation) plan was educationally unsound.
>
> The data indicated that: there were certain mistakes about the desegregation of schools and I wanted to apprise the court, nation, whatever level I found.

Differentiation Processes

Another strategy used by some defense experts to ease political conflict (particularly party conflict) involved differentiating the parties in the case(s) in which they were involved from the general liberal classification of school desegregation litigants. The particular school boards for whom they testified were distinguished from the assumed category of conservative and racist defendants, and/or the plaintiffs were seen as other than liberal, progressive and pro-civil rights.

Some respondents began this differentiation process before deciding whether to testify in a particular case. They made inquiries into different facets of the litigants, and the cases they were developing, including: attorneys, legal theories, administrators' desegregation plans and other actors' positions on school desegregation. These inquiries were designed to provide scholars with information on whether they could testify for a particular party "in good conscience." For defense experts, this generally meant that they could support the defendant's position in a particular case, but not the plaintiff's.

The likelihood of pre-testimony inquiry is strongest when experts feel some initial conflict or ambivalence about a particular party affiliation. If, from the onset, they are comfortable with the thought of testifying for a particular side, an inquiry into the merits of the two sides is probably unnecessary. Thus, defense experts, probably because they anticipated greater party conflict, employed the inquiry process more often than plaintiff experts. Over half the defense experts (52 percent) reported making inquiries into the litigants and/or the case before agreeing to testify, while only 14 percent of plaintiff experts reported doing so. The following statements by defense experts illustrate the nature of their inquiries.

> I really needed to know where these people actually were because I'm an old-fashioned liberal. School administrators in the past have frequently opposed busing for either their own convenience or for motives that are somewhat racist or political. And I needed to know for sure whether the school administrators had a reasonable plan, that they were acting in good faith. I got a copy of the plan and talked extensively with other experts who had testified on their behalf and whom I respected.
>
> Before I agreed to testify I wanted to get a feel for what the litigation was about and get some view of the actors in the trial. I made a trip to the city to talk to the lawyers. I wanted to see who I'd be working for. . .I agreed to testify because my investigation convinced me that the plaintiffs' (desegregation) plan was so unfeasible that I felt comfortable being on the side opposing it.

Although most defense experts reported one of these patterns (86%), very few indicated both justifications at once. After all, they are incompatible with one another. The differentiation strategy implies that scholars will testify only for parties whose beliefs are similar to their own. Thus, liberal defense experts who anticipated discrepancies between their own positions and those of school boards, gathered information to ascertain whether defendants requesting their testimony shared their views about the case and about desegregation. On the other hand, the strategy of neutral dissemination implies the requirement to testify in terms of a professional obligation to disseminate data to any requesting party. Within this view, it is inappropriate to disseminate data only to parties whose political views mirror one's own. As such, experts should not limit their defense testimony to those school boards that upon investigation have been found to be "exceptional cases."

Summary

In this study, defense scholars faced a set of political conflicts, related to their party affiliation, that were relatively nonexistent for plaintiff experts. Thus, it is clear that all experts did not face the same courtroom environment. Rather, those testifying on one side tended to experience the courtroom and the role of expert witness differently from those testifying on the other side.

The very existence of thse political conflicts challenges the attempts to separate completely academic and applied science. Once of the basic differences often asserted between the academic and policy sphere is that the former, as opposed to the latter, is not guided by extra-scientific influences. However, our data indicate that the social science community (or at least some of its members) is seen to use political or ideological criteria to evaluate scholarly endeavors, especially applied scholarly efforts. Controversies within the academy, such as those discussed in Chapter 6, here take on a decidedly partisan flavor. Defense scholars felt they were penalized because their party affiliation deviated from the preferred liberal stance of the social science community. The use of political evaluative criteria within the social sciences illustrates the potential overlap between characteristics of the academic and policy spheres. A more realistic vision of social science would see it as "involved in the struggle"; admittedly or not, knowingly or not, in the courtroom or not!

CHAPTER 9: ATTORNEYS' USE OF "IRRELEVANT" TESTIMONY

In Chapter 2 we noted that the desegregation cases often take place in the midst of conceptual confusion as well as conflict. Not only are there many different definitions of desegregation, there are many different ways to assess its existence and plan for its attainment. Moreover, the legal standard for violation and remedy often are contradictory and changing, even as the racial environments of our cities and schools change. Attorneys electing to try these cases have to make difficult choices about developing a legal strategy, and selecting the issues appropriately at stake. When these attorneys elect to include social scientific data in the cases, they also must generate a vision of how these data might be relevant to the matters in dispute. In this chapter we discuss some of the criteria attorneys utilize in considering the utilization of scientific evidence, and some of the problems they report in deciding upon, gaining access to, and using such testimony.

The Nature of the Cases and the Problem of Relevance

At the violation stage of desegregation trials, the Supreme Court has clung to the de facto - de jure distinction, refusing to adopt a view that segregation per se is unconstitutional. The plaintiff must prove specific intentional acts by the school board to segregate children (or faculty) by race (see Washington vs Davis 426 US 229, 1976; Village of Arlington Heights vs Metropolitan Housing Development Corporation, 429 US 252, 1977). Such issues of intentionality and fault are at the heart of an individual view of social issues and a "private law" model of dispute settlement.[1]

When we examine remedies, however, we see that the courts have adopted rulings that more nearly conform to the public law model. Since Swann vs Charlotte-Mecklenberg (402 US 1, 1972), and Denver (Keys vs School District #1, 413 US 189, 1973), the courts have severed substantially the connection between right and remedy. Desegregation orders are tied only loosely to the particular faults of the defendant, and more often address what is needed to alter the structural basis of segregation in the local district (Fiss, 1971).

This analysis is of course a simplification of the complex path the desegregation cases have taken. There are some judicial opinions which appear to adopt a public law view of violation (see, e.g., Justice Powell's dissent in Keys, 413 US at 222), and there are opinions which seem to adopt a view of remedy closer to the private law model (see, e.g., Dayton Board of Education vs BrinkmanI, 433 US 406, 1977). The law has been and remains muddled on these issues (Yudof,1978; Fiss, 1971).

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[1] See the discussion in Chapter 2 and Chayes (1976), with respect to this preliminary material.

The muddled nature of the case law regarding desegregation is no accident; it both reflects and is a source of substantial conflict as to the "correct" definition of the litigation. Unlike many "private" suits, in this and similar "public" cases, the question of the nature of the dispute and the choice of adjudicative model is nearly always contentious. An important part of the contest between litigants is the attempt to impose a basic understanding of the litigation, to define the "scope of the lawsuit", to make it more or less like a public law or a private law litigation. Basically, a key question at stake in these cases is: "what kind of a problem is racial inequality?" According to some, it is a problem in individual prejudice, created by intentional acts of specific persons. This view is consistent with individual interpretations of the litigation, and the private law model of dispute settlement. According to others, inequality is a problem of social structure, created by historic and socially determined patterns that overshadow any single person's intentions or specific acts. This structural view is consistent with the public law model of lawsuits and of controversy settlement. Thus, the evidentiary contest is not simply what facts are true, but what facts are relevant at all.[2]

In this chapter we focus on one part of the broader contest; attorneys' use of science evidence as a resource in the conduct of the school desegregation cases.[3] While this evidence is but one element in the larger contest, it will, we hope, indicate some ways in which attorneys fight for control over the definition of the suits, have differential access to resources to conduct this fight, and provide suggestive insights into their success in persuading the judge to their understanding of the case.

In attempting to understand the reasons and procedures by which attorneys use social scientists in these cases, we explore two related issues: (1) patterns of use of experts, and (2) impact of testimony. With regard to both these issues, differing conceptions of the nature of race relations and racial inequality (individual vs structural) and the proper model of litigation (private law vs public law) are involved. Plaintiff and defense attorneys appear to have differential access to social science expertise. But, over and above the problem of access, plaintiff and defense attorneys have different conceptions of how and why to use such resources. Finally, judges with different conceptions of these issues have different reactions to these cases, and to the social science introduced.

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[2] For a fuller discussion of these models of race relations, see Chapter 1 of this report and Chesler (1976).

[3] In this Chapter we restrict ourselves to a discussion of academic experts testifying at the violation stage. It is at this stage that school law is made, and it is here that the parties must persuade the judge as to the nature of the case, as well as the character of racial segregation in our schools and society.

Plaintiff-Defendant Differences in the Use of Social Science Witnesses

One striking difference in the use of academically-based expert testimony is that most experts at the violation stage of the trial are employed by the plaintiffs.[4] In the 17 cases in this sample, Table 9.1 illustrates that plaintiffs used fourteen different experts at the violation stage while defendants used only five. Moreover, counting individuals substantially underestimates this difference, because a few plaintiff witnesses have testified in numerous cases, while defense witnesses have rarely testified in more than one or two of these cases. Counting person-appearances rather than persons indicates that there have been approximately 33 person-appearances for plaintiff experts and only 7 person-appearances for defendant experts. Finally, if cases are used as the unit of analysis, in eleven of the seventeen cases plaintiffs presented experts at violation, while defendants presented experts in only three.[5]

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[4] The terms plaintiff and defendant must be used cautiously, for the formal position of parties sometimes masks their objectives and positions. Moreover, their position may change in the course of litigation. Most typically, inner-city school districts, like those in Detroit, Richmond and Wilmington may begin and even remain as formal defendants in litigation. But at a later stage, as when cross-district violations and remedies are considered, they share a point of view with the formal plaintiffs. We have adopted the convention of treating them according to the substantive position they advance at a given stage of the trial. Thus, for example, Detroit school board attorneys bringing experts to testify for the necessity of a metropolitan remedy in Detroit are treated as plaintiff lawyers, although they are in fact formally defendants.

[5] In most cases, apportioning experts to violation or remedy hearings is a straightforward process since the trial is bifurcated. In some cases, however, this is not so. For example, in St. Louis the judge heard evidence on violation and remedy simultaneously. In Omaha and Dayton there was a special hearing after remand from the Supreme Court to determine the Incremental Segregative Effect of school board acts on the overall segregation of the system. When confronted with such situations we have used our best judgment to assign witnesses to violation or remedy. In particular, we have treated Incremental Segregative Effect testimony as part of the violation stage, since it speaks to whether the board's actions had a significant impact on the segregation in the school system.

Table 9.1

Plaintiff and Defendant Use of Academic Experts at Violation in Seventeen Cases

Use of Experts	Plaintiff	Defendant
Number of Experts	14	5
Number of Person-appearances by Experts	33	7
Number of Cases in Which Experts Appeared	11	3

It is clear from these figures that whatever role social science witnesses played during the violation stage of these school cases, they have been primarily a resource of plaintiff groups. Why are plaintiff lawyers so much more likely than defense lawyers to use academic social scientists at the violation stage? The answer appears to be in two parts. First, plaintiffs have easier access to experts. Second, plaintiff and defense lawyers have differing conceptions of the litigation, which cause them to see social science evidence as more or less useful.

Access to Experts. Defense lawyers report that it is relatively difficult to find social scientists who are willing to testify for their side. They perceive a bias within the academic community which results in high costs to any academically-based expert willing to testify for a school board. They mention occasions where experts, both prominent and less well known, have refused because of a fear of the effects on collegial associations or job prospects. According to one lawyer for the defense:

> (Expert X) was one of the few people who would be willing to talk to us even though we were on the 'wrong side'. It's not fashionable to be defending these lawsuits. It's fashionable to be on the other side. After talking to one or two of the local sociologists, we did not find somebody who would go along with us. We would find people who, because of peer pressure, did not want to testify for the defendant regardless of what the facts were or anything else. . .We were told, off the record, that if they did work for our side they were categorized as a defense witness. Their access to grants, promotions, to new relationships in their professions would be greatly jeopardized. If a man is doing a study showing how blacks are being mistreated, that's great. The Ford Foundation will give money, the government will give money, so forth and so on. If they are doing a study, not quite as bad as Dr. Shockly, but a study showing that blacks deserve what they get, no money will be forthcoming. I thought it was fear on their part.

Another reports:

> We weren't going to get any sociologists that were going to agree with us. Although we looked around and tried some folks, we were not successful.

The defense's perception of unavailability is shared by some of the plaintiff lawyers. They occasionally report the advantage they have due to the relative availability of social scientists.

> I'd have to say there is a little bias in the field. If you testify on behalf of plaintiffs then you aren't as nasty a person as somebody who testifies on behalf of the school boards. . .I certainly picked that up just talking to experts at various universities. There's a certain distaste about people who will help a school board out. I'm sure it goes back to this whole claim that there are constitutional rights and these are discriminators you are helping. (Expert X) is a guy that loves minorities. That makes you very unpopular in some circles, but in a court of law there is nothing dishonorable about someone who's trying to help the downtrodden. That works to our advantage, there's no question about it.[6]

Social scientists testifying for the defense substantiate attorneys' views of their reluctance to testify, citing reasons explored in Chapter 8. Some scholars, who identify with liberal and pro-civil rights' values, experience internal political conflict in testifying for boards they perceive as conservative and anti-civil rights. Other scholars report fears that the liberal scientific community might (or in some cases has already) sanction them for allying themselves with the "wrong" side.

Defense lawyers' difficulty in finding experts is not due entirely to social scientist reluctance. A related disability is the defendants' relative inexperience in this area of law, and their lack of social and political connections to others in the area. Less than 20% of the defense lawyers we interviewed had prior experience in desegregation cases. Typically the school board is represented by a major law firm in the defendant city. The firm is chosen because it has represented the school system in the past, but this work typically involves such matters as managing labor relations, acquiring property, drawing up contracts, organizing pension funds, and the like. Rarely does it involve Federal Court trial work; and rarely does it deal with civil rights matters. Thus defense lawyers have little preparation for a school desegregation case in advance of the present litigation.[7]

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[6] This is not to imply that the experts in these cases are themselves biased in any perjorative sense, or that they would say anything for the "cause". Indeed, the data from both lawyers and social scientists would suggest that this is not the case. We can separate the general bias within a discipline and the personal bias or integrity of specific individuals. In Chapters 6-8 we review recent literature as to whether social science is biased in either of these ways, and whether and how it should be used in court.

[7] The lack of experience has caused some firms to employ attorneys specializing in Federal Court trial work.

Plaintiff counsel present a different picture. In most of the cases we studied at least one of the party plaintiffs is a national organization (i.e., the NAACP, the Legal Defense Fund, the ACLU or the Department of Justice), and each of these groups has tried many school cases. Seventy-five percent of the plaintiff attorneys we interviewed had prior experience in school desegregation litigation. Prior experience builds networks to particular social scientists and to the academic community as a whole, or to other lawyers who have such contacts. Thus, plaintiff lawyers are more likely to know who can and will testify to some point. Of equal importance, they have contacts within the social science academy who can tell them who would be a good witness on some point. Prior experience also builds a trusting relationship between lawyers and experts, which makes it easier to recruit the expert for the next trial.[8] Two plaintiff lawyers report:

> We've used a number of social scientists. Every case, every school case in which we're involved, we'll use social scientists because we really can't conceive of a school desegregation case that is one-dimensional. And therefore, we have developed over time a knowledge of the field. We know who is active, we know who is doing what, we know those who have written analytical work, who have conducted surveys and studies. We know who the people are.
>
> There's a real good network of social scientists set up for plaintiffs. These are people who have consistently been there. If they can't do it, they know a lot of others.

Sometimes this network becomes particularly obvious. The NAACP has what has variously been called a "traveling road show" or a "dog and pony show". Since the same experts appear in numerous cases, new cases do not require new recruits, new learning and a new trust relationship. The lawyer does not have to repeat the difficult task of determining what the social scientist has to offer and then preparing him for the witness stand.

Defense lawyers, on the other hand, often must start from scratch in each trial, attempting to recruit a person with whom they have never worked. In a few recent cases, defense attorneys have begun to identify and recruit a team of scholars. As one defense attorney indicated:

> We had a network of about all the school systems in the U.S.A., and not only 7 northern ones. At this late date I can't tell you precisely what prompted us to go to a particular individual or source for a particular kind of evidence of testimony, but you almost have, literally, a network

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[8] Marc Galanter (1974) notes the many advantages "repeat players" enjoy over the "one shot" players in the courtroom. In this terminology the plaintiffs are the repeat players, they try case after case, while defense lawyers are one-shoters. Among the advantages Galanter mentions is the ready access to specialists and expertise.

> of communication, reminds me of the Revolutionary War. We were on the case that was on the hot seat, or the prime candidate, or the first guinea pig. And as a result, we were somewhat the focal point of that organization. We had them from Detroit, Cleveland, you name it, we had them. As a result we had quite a cross-pollination of thoughts about what should be proved, how it could be proved, who the prominent people were and things like that. It was very effective. Everybody is looking for consolation, so we consoled each other.

Despite this recent network of defense attorneys and scholars, only a very few of the attorneys we interviewed were connected to it. Thus, the data clearly indicate a much more powerful, consistent and historically active collaboration among plaintiff actors.

The differential experience with these cases, and with social scientists in particular, has another effect. The defense lawyer may not be sure exactly what testimony he or she wants. It takes time to come to an understanding of the full potentials within a body of the law, and of the ways in which social science testimony may prove useful. Defense lawyers often have little time for reflection and conceptualization. One leading defense attorney argued that this is not a problem, as a major law firm should be able to mount a full defense of any issue within a reasonable period of time. Perhaps. But, the view of the case most frequently presented by defense lawyers suggests that they possess a relatively traditional vision of the dispute.

The Relevance of the Expert Testimony. This leads to a second central question concerning the use of social science testimony at the violation stage. What is its relevance? Most of the evidence provided by social scientists is not directly relevant to the issue of whether the school board has intentionally segregated students because of their race. According to Chayes' "private" law model, this is the evidence these cases should turn on. Indeed, since Brown, the Supreme Court has steadfastly maintained that the heart of a school case is whether the school board has engaged in intentional acts of discrimination. In southern cases, the existence of statutes and constitutional provisions requiring a dual school system is proof on this point. In northern cases, however, the proof cannot be made in this fashion. The state government has no such provisions (or has had none for 50 years or more), and the announced policy of school boards has been to not segregate students by race. In the absence of admissions of segregative purpose, plaintiffs must put on testimony which examines the acts of a school board and imputes to them both a segregative purpose and effect. The plaintiffs do this by looking at boundary shifts, feeder patterns, choice of school construction sites, optional attendance zones, teacher assignment policies, intact busing and the like, which cause or maintain segregation. This, they argue, is evidence of segregative purpose. In turn, defendants try to explain such decisions in terms of other, legitimate, purposes of decisions, such as neighborhood school policy or the relief of over-crowding. Although this type of evidence is most directly probative as to school board intention, almost none of it comes from social science experts. Of the 19 violation witnesses who testified for both plaintiff and defendant, only two were called primarily to testify about the segregative purpose and effect of discrete acts of the school board.

As reviewed in Chapter 3, the expert testimony does address two different sets of issues: (1) the educational and psychological consequences of segregation and desegregation and (2) the nature, causes and effects of residential segregation.[9] Testimony on educational and psychological effects has addressed such issues as the academic achievement of white and black students in segregated and desegregated schools; the long-term benefits of desegregation in terms of college admissions and employment; and the unmeasured effects of desegregation on the values and beliefs of white and black students in their later life (learning to live together). None of this testimony is essential to the legal issue at violation; nevertheless, such testimony appeared in 10 of the 17 cases.

The testimony on the nature, causes and effects of residential segregation has addressed such topics as the demographics of residential housing patterns in American cities; the effects of federal state and local governmental decisions on housing segregation; the degree to which housing segregation can be explained by economic factors such as proximity to jobs, housing costs and income differences between white and black families; the preference of whites and blacks for neighborhoods of different racial composition; the history of housing discrimination in a city; and the reciprocal effect of housing and school segregation on one another. While plaintiff attorneys intend some of this testimony to speak indirectly to school board intentions, or at least to school board disregard of the segregative consequences of their actions, most of the testimony is not directly relevant to the legal issue of whether the school board engaged in specific acts designed to segregate schools. It appears, however, in eleven of the 17 cases sampled.[10].

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[9] As this testimony is not directly necessary to the question of violation, narrowly defined, it might be excluded as "irrelevant". While a few judges have in fact attempted to exclude such testimony, most judges have let everything come in, with the view that they could sort it out later. This is in line with Chayes' observation that in any litigation with public law overtones the boundaries of appropriate evidence become murky.

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[10] As can be seen in Table 9.2, none of the experts for the defense testified as to the educational or psychological well-being of the children. For a brief period after *Brown*, defendants attempted to use a few experts such as Ernest van den Haag and Henry Garret to suggest that black children might be harmed by integrated education, that each race has "distinguishable educability capabilities", and that desegregation would affect the educational standards of the schools (see *Evers vs Jackson Municipal School Districts*, 357 F. 2d 425 Fth Cir, 1964; and *Stell vs Savannah-Chatham County*, 318 F. 2d 425, 5th Cir., 1963). The appellate court rejected such testimony as a factual attack on Brown (Newby, 1967; Gregor, 1963; van den Haag, 1960). Today, most defendants would not use such testimony even were it admissible. Reports one defense lawyer:

> There were some people, and I can't even remember the guy's name, that I think was available and had written some things that said that black people genetically were inferior and couldn't learn as well as white people. We were certainly not interested in anything like that. We thought that would not be a credible position to take and it wasn't the position that we were taking at all.

Even less extreme testimony, however, has sometimes met a similar legal fate. One of the social scientists we interviewed reports the following experience:

> The legal doctrine is cast in concrete, and that's been one of my frustrations. It's as though the evidence is really immaterial. A legal doctrine makes certain assumptions of facts as to the effects of desegregation. I remember in the (X) case, this was Judge (X), and I was talking with him from the witness box, and questioning some of the testimony in *Brown*. He asked me, "are you questioning the facts of Brown?" And I said "yes," and he said, "Well that's not admissible for you to be doing that." So it kind of stymies a person when the evidence in Brown argues that desegregation will change attitudes, increase self-esteem, and improve school performance, when in fact that doesn't happen. We know that it doesn't happen, but there's a difficulty in making that point with the judge.

Table 9.2

Types of Testimony by Plaintiff and Defendant Experts at Violation in Seventeen Cases

Type of Testimony	Plaintiff	Defendant
Number of Experts Testifying On:		
a) Educational and Psychological Effects	6	0
b) Residential Segregation	6	5
Number of Person-Appearances on:		
a) Educational and Psychological Effects	11	0
b) Residential Segregation	17	7
Number of Cases Where Experts Testified On:		
a) Educational and Psychological Effects	9	0
b) Residential Segregation	11	3

Given the nature of this expert testimony, a second reason why defense lawyers infrequently employ social science evidence becomes clear. They usually envision the defense as an effort to meet each alleged occasion of intentional segregation by providing alternative explanations for the given act, and not much more. Academic expert testimony is seen as unnecessary if it does not speak directly to these acts. Consider these two statements by defense lawyers:

> But in this case the question was, was there (intentional) segregation at all? So social science really doesn't get into that question very much. In fact, we argued that it was inappropriate to have any expert testimony on the educational effects of the segregated schools until it came to the remedy phase, what to do about it if it was.

> We didn't offer experts. We didn't even make a 'beachhead' or an issue of the question of whether or not segregation if it did occur, or racial imbalance if it had ever occurred was or was not harmful. That just didn't seem to me like that was the question raised at trial.

The feeling that social science evidence is unimportant also may affect the lawyers' decisions on cross-examination of such presentations. One defense attorney reports:

> I can't recall asking (a plaintiff's expert who testified on residential segregation) any questions. I know we didn't give any great concern to their testimony insofar as we didn't think their testimony was crucial to the issue of (our) liability.

Defense lawyers appear to adopt an individual view of school policy, for which a private law model of litigation is appropriate. In Chayes' terms, they would prefer that the evidence be historical and adjudicative; directed at alleged acts of specific wrong-doing of their school board in their town. This view of responsibility for wrong-doing influences the nature of the matters which are considered to be properly in dispute. As responsibility is seen to hinge upon the acts of the school board as a collection of individuals who make choices, the evidence should be restricted to the incidents of their alleged wrongdoing, and to particular decisions within the control of the board. Other testimony, on educational achievement or residential demography, does not speak directly to these choices: nor does testimony about alleged wrongdoing of other, unrepresented, groups such as boards of realtors. Such testimony therefore, is unnecessary or even irrelevant from the point of view of most defense lawyers.

In support of the argument that defense lawyers generally see social science as irrelevant, consider the main reason they give for using such experts on the rare occasions when they are employed.

> We only use them because the other (side) did. We thought they were full of bull, if you really want to know.
>
> From a legal standpoint, we felt we had to have a sociologist to counter their sociologists. It just got down to all the sociologists wanted, in my opinion, was to prove their own point regardless of what the premise was to start out with. As long as they could prove their own point, they were happy as larks, they didn't care about anything else. And I thought the whole thing was just a waste of time. I thought we would have had been better off if we could agree that they have no sociologists and we would have no sociologists, and we could just present our facts to the court and let (it) come up with a decision. But you can't do it that way--they have a sociologist and we have to have one.

Plaintiff counsel employ academic experts because ultimately they wish to advance a different view of responsibility, and, therefore, of the issues appropriately in dispute.[11] The position of blacks and other minorities must be understood in terms of the historical and structural conditions in the society. A focus on the broader setting within which the specific case exists reflects this structural emphasis and is consistent with a public law model of the case. As such, academic testimony that establishes this framework or context is quite relevant for the plaintiff lawyers. As one plaintiff attorney notes:

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[11] This does not mean plaintiff attorneys are unmindful of the necessity of evidence concerning specific school board acts. Plaintiffs do present testimony concerning specific violations. The point is, they also do more.

> We use social science evidence because it is not possible to talk about or deal with racial discrimination or racial segregation in a societal vacuum. The purpose of segregation was to create, maintain and protect a sociological, ideological, to some extent a religious and philosophical point of view. Segregation and discrimination became the political and logistical vehicle by which this was done. Therefore, to fully assess and describe the impact of the schools now, segregation as it was created and maintained and carried out by the school system, you have to look at not just the fact of segregation, but its effects as well. We figure it's important for a judge to understand the context within which the individual actions produced the segregation, and to characterize the discrimination that took place. Whether this is testimony having to do with the impact of school segregation on black children's learning ability, or anything else, doesn't make a difference. The effort is to present the full context within which the public officials who created segregation carried out their game plan.

The public law model looks to the school system as part of a community, as an organization with a supra-individual structure, with organized policies and programs. These contexts, policies and programs, not just discrete acts of the board, are at the heart of the problem. In its strongest form, the public law model would assess responsibility by looking at the outcome of these programs.[12] This view minimizes the element of intention and, therefore, the distinction between de facto and de jure segregation.[13]

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[12] "In the latter (public law) case, inquiry is only secondarily concerned with how the condition came about, and even less with the subjective attitudes of the actors. . . Indeed, in dealing with the actions of large political or corporate aggregates, notions of will, or fault, increasingly become only metaphors" (Chayes, 1976: 1296).

[13] As suggested in Chapter 2, plaintiffs have advanced several arguments designed to move the courts away from a private law model of violation by easing or abolishing the proof of intent. In early northern cases they attempted a straight de facto theory that segregated schools were sufficient to require desegregation, mainly on the Brown-like premise that such schools deprived minority students of equal education. Several cases were lost on this theory (see Bell vs School City of Gary, 324 R. 2d. 209. 7th Cir., 1963; Barksdale vs Springfield School Committee, 348, F. 2d. 261; 1st Cir., 1965) In another attempt, plaintiffs advanced the argument that proof of intention should not be required. Rather it should be sufficient to prove that the school board made a set of decisions which had the forseeable impact of segregating schools (Oliver vs Michigan State Board of Education, 508 F. 2d. 178. 6th Cir., 1974). The Supreme Court also rejected this standard in Washington vs Davis (426 U.S. 229. 1976), and Village of Arlington Heights vs Metropolitan Housing Development Corporation (429 U.S. 252. 1977). Finally, plaintiffs have advanced the argument that segregative purpose on the part of governmental groups other than schools should be sufficient to support a finding of unconstitutional segregation. The Supreme Court has never formally rejected this line of argument, but it also has bypassed opportunities to accept it in Keys vs School District No. 1. (413 U.S. 189. 1973), and in Milliken vs Bradley (418 U.S. 717. 1974).

From this more structural perspective, school board policies also must be understood within the wider context of American race relations. Thus the matters in dispute are not limited to an incident, or even a set of incidents taken by themselves. The incidents are but parts of a larger set of social relations and organizational dynamics which affect school segregation. To quote Owen Fiss:

> These incidents may have triggered the lawsuit. They may also be of evidentiary significance: evidence of a "pattern or practice" of racism or lawlessness. But the ultimate subject matter of the judicial inquiry is not these incidents, these particularized and discrete events, but rather a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition (Fiss, 1979: 18).

According to this structural view, and according to plaintiffs advancing this vision of the issues, the school board should be required to formulate policies and programs designed to counteract these "naturally segregative" processes.

The relevance of expert social science testimony becomes apparent from this wider perspective. The educational and psychological well-being testimony examines the existing inequalities within a school system and outlines the probable consequences of a segregated or desegregated system. The initial conditions and projected outcomes are the result of segregation, *per se*, not necessarily *intentionally* segregative acts of the school board. And the residential segregation testimony establishes the nature of the social and demographic arrangements within which school board policies operate and, therefore, the likely outcomes of those policies. Policies which may be neutral on their face, such as a neighborhood school policy, a tracking system, or construction of schools in new subdivisions, may be shown invariably to have segregative consequences.[14] All of this testimony examines the outcomes of school system policies within the context of structural arrangements maintaining racial inequality in the society at large. It shares a public law perspective insofar as it is basically predictive and legislative rather than historical and adjudicative, and insofar as it goes beyond the activities of the board to examine the behaviors of other relevant groups in the society (Chayes, 1976).

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[14] In another setting, we have argued that a core element in understanding institutional racism and inequality in American society involves acknowledging that "business as usual", when inequality is "usual," inevitably supports and sustains such inequality (Chesler, 1976). Thus, individual neutrality, in a structural context of discrimination and inequality, at least passively supports continuing discrimination and inequality.

The Impact of Expert Testimony

Since the Supreme Court has not abandoned a private law model of responsibility in school cases, and since most academic expert testimony does not speak directly to the issues in dispute within this model, what role does the testimony play? What is the relevance of this legally "irrelevant" testimony? According to plaintiff lawyers, there are two central ways in which this testimony is beneficial: first even within a model looking to school board purpose it may undermine the defense's case; and second, it may persuade the judge to a more structural or contextual understanding of race and of segregation in school and society.

Undermining the Defense. Normally, the plaintiffs can anticipate a neighborhood school defense by the Board. The Board will argue that its actions were in pursuit of a neighborhood school plan and, therefore, were not motivated by a segregative purpose. Regardless of the outcome, they were racially neutral acts. Testimony about segregation in housing, jobs, etc., undermines the defendant's case before it is made, because it establishes the context within which apparently neutral acts lead to further discrimination. Further, it insinuates that if other individuals and organizations have been discriminating, school boards must have discriminated as well. To quote several plaintif lawyers:

> Part of putting on a housing case is as a means of countering a pat defense that the school board uses. Their pat defense is that all they did was build the school where the kids were.
>
> You show the whole housing phenomenon, the whole business. Because when the school board comes on with their proof about the neutral reasons, the non-racial reasons, why they did all these things—by the time you have finished setting the scene in which those things happened, the real world, then the Judge, in order to believe that race was not a factor in those decisions, has to believe that there was a magic door in the schoolhouse.
>
> Part of the reason we need to use these people is to anticipate the defense. The defense generally has very little to say other than 'we haven't done it'. So part of what we present with social science testimony is 'the board of realtors has done it, the governor's office has done it, and if everybody is doing it, how can it be reasonable that in the same time frame the educational institution wasn't doing it?' It's a tactic, part of what we're presenting. Beat them before they can even come in and say it. Make them look silly.

Educating the Judge.[15] Plaintiff lawyers believe the expert testimony can sensitize the judge to a structural view of racial relations in America, and potentially bring him to a more public law view of the case. This is a broad agenda: it is more like playing for new rules than for acceptance of a particular fact set.[16] One of the plaintiff witnesses describes the purpose of his testimony in the trial in the following terms:

> I think maybe it has played a part in kind of an overall impression that the judges get that virtually every level of society, from the federal government to the local school board, conspire wittingly/unwittingly to cause this awful situation we're in right now. But they haven't been able to see, so far as I can determine, legal relevance to my testimony. To the extent it's helpful at all, it is so by adding to the panoramic picture of a society in which for years everything led to segregation.

Educating the judge is an explicit purpose reported by some plaintiff counsel:

> Most judges come from conservative traditional backgrounds. They have sort of a 'gut' reaction about uprooting and busing and that kind of thing. So you have a problem of convincing and educating a judge to do something which goes against his gut. In order to really be able to do this, you can argue the law—but the law is not going to get to that visceral part—it takes the crafting of a lot of different kinds of information; also you have got to deal with the emotional aspect.
>
> This was a situation where a judge started off with every preconceived idea about education: why kids learn, why races are separate, so forth and so on, every Sunday Supplement type belief. A case like this is a mosaic and the first thing that you work on is the built-in attitudes that you perceive the court has. So it is a teaching experience. The best kind of expert witness that you can have is somebody who suffered sometime. What you do with a (Judge X) is put a guy like (Expert X); one who he knows is very bright, very articulate, tremendous educational background, extremely knowledgable about education and usually gifted in its expression. I asked (Expert X) three or four questions after I got his background. The rest of the time he and the Judge talked to each other. It was just a full exchange; when it was over the Judge had some idea what it might be like to be a minority person in this society.

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[15] In Chapter 13, we examine the problems and strategies of influencing judges in more detail. The discussion here reflects one such strategy, education or conversion.

[16] If we again use Galanter's distinction between repeat players and one shot players (see note 8, supra), it is not surprising that plaintiffs have played for rules in the litigation process. The one shot player is less concerned with the outcome of similar litigation in the future, while the repeat player is strongly interested in elements of the case which might establish precedent and thereby influence the disposition of decision makers in a future trial (Galanter, 1974).

> The experience in other communities has been that they've had to train the judge, teach the judge, educate the judge. I think some of that had to happen here.

Has plaintiff's expert testimony had the desired effects of undermining the defense and persuading the judge to a public law view of the case? To be sure, some trial level judges have stated that they find little use in social science testimony at the violation stage (Doyle, 1977). And as one of the judges we interviewed put it:

> I told him (the expert) that when he got things straightened out in Boston he could come here and tell me how to do things. I don't need social science evidence. I only need to decide a constitutional right, not the social aspect of these cases.

In other cases, however, the judge has stated openly that he has been influenced by such testimony (MacMillan, 1975). And as one of the judges we interviewed notes:

> I think it's true (that part of their job is educating the judge). Of course blacks have suffered some systematic and institutionalized racial animus. If you had someone on the bench who doesn't have this kind of knowledge, I suppose if I were a plaintiff's counsel, I would want to make sure in an important case like this that the judge is thoroughly familiar with racial problems in a large city and all the demographics that go with it. So if some or a large amount of it is irrelevant, then that is just something we have to go through.

Thus, social science evidence may give the trial or appellate judge some new information or insight on the general situation of minorities which he can use to bolster his opinion (Wisdom, 1975). But in some cases the effect may be greater, and may create a more wholesale conversion. The most noteworthy example is certainly the Pauline-like conversion of Judge Steven Roth in the Detroit case. In the plaintiffs' view, Judge Roth began the trial hostile to their position. They began their case with witnesses who discussed how structural discrimination created segregated housing in the Detroit area and how this led to school segregation. Other witnesses testified to the harmful effects of segregation on black children. None of this evidence was legally relevant in a narrow, private law model: it did not prove school board intention. Near the end of his testimony, before the plaintiffs had even introduced evidence on school board violation _per se_, a lawyer for a white parent told the school board attorney he thought the case was lost. Evidently, the testimony helped convert Judge Roth to a structural understanding of race relations in his community, and thus to a public law view of the case. Eleanor Wolf quotes the judge as saying, later:

> It is unfortunate that we cannot deal with public school segregation on a no-fault basis, for if racial segregation is an evil, it should make no difference whether we classify it de jure or de facto. Our objective should be to remedy a condition which we believe needs correction (Wolf 1976: 109).

Nor does Judge Roth stand entirely alone as an example of conversion: other examples are discussed in Chapter 13.

From time to time a lower Federal Court writes an opinion which openly adopts a more structural view of violation. Consider for example, the opinion of the Fifth Circuit Court in the Austin case:

> Whether or not the residential isolation of whites, blacks and Mexican-Americans in Austin is. . .the result of state action, the acts of the school authorities in taking official action, including assigning students and drawing zone lines on the basis of these segregated housing patterns were violative of the Fourteenth Amendment. (United States vs Texas Education Agency, 467 F. 2d 848, 863-64 n.22. 5th Cir. 1972).

The following holding by the three judge panel in the Wilmington case is in a similar view.

> Governmental authorities condoned and encouraged discrimination in the private housing market and provided public housing almost exclusively within the confines of Wilmington. . .We. . .conclude that governmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades. This conduct constitutes segregative action with inter-district effects. (Evans vs Buchanan, 338 F. Supp. 428, 438).

Even in cases where the opinion has been less explicit, some elements of the judiciary have been willing to accept a limited set of incidents as proof of segregative purpose, and to place upon the defendants the burden of showing these incidents were not undertaken with any racial animus (Brinkman vs Gilligan, 583 F.2d 243, 6th Cir. 1978). This is relatively open acknowledgement that structures of racial inequality operate and have impact almost regardless of the deliberate behaviors of key actors. The two Ohio cases from the summer of 1979 reinforce this line of argument. They have literally established an affirmative duty to desegregate upon nearly every school system which contained segregated black students in 1954 (Columbus Board of Education vs Penick 99 S. Ct. 2941, 1979; Dayton Board of Education vs Brinkman II, 99S. Ct. 2971, 1979). At least with respect to intra-district cases, it has become difficult for a school board to succeed with neutral explanations for any act which has the effect of segregating students.

Finally, as we noted earlier, a public law point of view has been more evident at the remedy stage. "Root and branch" desegregation can only be understood if we adopt the perspective that there is more at stake than correcting the individual acts of school officials. A plan which calls for the approximate racial balance of all schools in a district remedies much more than the segregation caused by intentional acts of the board (Fiss, 1971). It calls upon the school system to take affirmative acts to overcome the segregation and inequality caused by the social, organizational, and demographic (structural) factors which separate white and black children.

The social science evidence presented at violation appears to be one of the factors moving the judiciary, often with considerable reluctance, toward remedies which are more legislative than adjudicative.[17] Early in the process of litigation it may begin to sensitize the judge as to what will be necessary if the remedy is to be "just and viable." It reflects an understanding on the part of plaintiff counsel that:

> . . .judges who were asked to decide questions of social and economic policy ought to be educated about the social and economic "facts of life", since their decisions necessarily would reflect their attitude toward these matters. (Schubert, 1964: 2).

Of course it hardly needs saying that this movement toward a public law view of school cases is the product of many factors beyond the social science evidence. But the evidence has played a role in widening some trial judges' visions and in altering their perceptions. To quote one final judge:

> To me social science is the study of people and how they got where they are and how they act vis-a-vis other people. It is the history, politics, economics, legislation, court decisions, the traditions, money and eveything being done by the legislature and other people to get where you are. I'd say social science has been an integral part of considering the constitutional question.

The Supreme Court has never adopted a fully structural view of violation in the school cases. It has held steadfast to the requirement that the plaintiff must prove some school board intent to segregate. From this model, strictly defined, much of the expert testimony is of marginal relevance. But the plaintiff's "irrelevant" testimony has played an important role nevertheless; it has helped present trial and appellate judges with an alternative way to define the problem, assess the evidence, and think about remedy. By educating some judges to a more structural view, the testimony has eased the proof of violation and extended the scope of possible remedies. In this sense it may have been some of the most relevant testimony of all.

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[17] As one of the judges we interviewed commented:

> From the calm sit-back judges of adversarial interactions, we had to become activists, we had to become innovative, we had to look for practical solutions rather than legalistic rulings.

CHAPTER 10:

PREPARATION OF WITNESSES

> There is a tremendous problem in putting on expert witnesses, in putting them on the stand, because they don't know how to talk to judges. They know too much, their theories in their heads are too bright. They cannot talk to others, they have a hard time talking to lay individuals, which judges are on expert testimony.

In the words of this attorney, placing expert witnesses on the stand is fraught with difficulty. The use of social scientific experts as witnesses in school desegregation cases calls for new behaviors on the part of almost all parties or actors in the courtroom situation. In addition to the normal kinds of preparations lawyers make for any trial, they must also prepare to deal with the particular nature of social scientific evidence, and the people who will present it. Social scientists, on the other hand, not only must prepare their own materials, they must prepare themselves for the unusual experience of appearing in court. In this chapter we review the kinds of preparations attorneys and scientists made in getting ready to use social scientific evidence in the school desegregation cases.

The presentation of witnesses usually involves some foreknowledge, and therefore specification, of their credentials and probable testimony. For instance, in the Cleveland desegregation case, attorneys indicated they would be presenting expert scientific witnesses to testify to various matters.[1] First, for the defendants:

> Dr. Nathan Kantrovitz, professor, Kent State University, Kent, Ohio. He will testify, as an expert, as to ethnic and racial segregation in Cleveland and its causes and its relation to school segregation.
>
> Dr. Nathan Glaser, professor, Harvard University, Cambridge, Massachusetts. He will testify, as an expert sociologist and educator on the adverse effects of the forced quota allocation of students, by race, with regard to academic achievement, self-esteem, aspirations and racial polarity.
>
> Dr. Margaret Fleming, Director, Research and Development, Cleveland Public Schools. She will testify as to the Cleveland Schools' testing procedures, the various efforts to eliminate the adverse effects of racial isolation made by faculty, Board and staff, the compensatory education program, the correlation between poverty and achievement, the comparability reports, the evaluations of the disadvantaged pupil program funds, the various evaluation abstracts under Title I of the Elementary and Secondary Education Act of 1965, the educational and sociological effects of forced quota allocations of students, the impossibility of using 1970 Census date to project school population, mobility data, and various other research, findings and reports bearing on the absence of segregative intent in specific Board and staff conduct. Dr. Fleming will also testify as an expert sociologist and educator on the adverse effects of the force quota allocation of students by race with regard to academic achievement, self-esteem, aspirations and racial polarity.

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[1] From "Tentative witness list of defendants Briggs & Board of Education" (filed 11/24/75), and "Plaintiffs' reserved list of witnesses" (mailed 11/20/75), U.S. District Ct. for Northern Dis. of Ohio (Eastern Division).

And for the plaintiffs:

Robert Green, PhD, Dean of College of Urban Studies, Michigan State University, East Lansing, Michigan. Educational psychologist. To testify on community perceptions towards segregated schools.

William Lamson, Demographer, NAACP. To introduce plaintiff's exhibits 75 through 98, map of school boundaries of the Cleveland Public Schools, 1940, 1945, 1950, 1955, 1960, 1965, 1970, and 1974.

Gordon Foster, PhD, Professor of Education, Director, Title IV Desegregation Center, University of Miami (Florida). To testify on the effects of policies and practices utilized by the Cleveland Board of Education.

Willard Richan, DSW, Dean, Department of Social Administration, Temple University, Philadelphia, Pennsylvania. Principal Investigator of a study sponsored by the United States Civil Rights Commission which culminated in report: Racial Isolation in the Cleveland Public Schools, published by Case Western Reserve University, 1967. To testify on findings of his study of the Cleveland Public Schools made pursuant to the above report.

Martin Sloane, Esq., Former staff member, United States Civil Rights Commission. Presently General Counsel, National Committee Against Discrimination in Housing, Washington, D.C. To testify on the effects of national and local housing practices and policies.

Karl Taeuber, PhD. Professor, Institute for Research on Poverty, University of Wisconsin, Madison, Wisconsin. To testify on pattern of residential and school race segregation throughout the country and in Cleveland, and the causal factors which contribute to both, and their dynamic interaction over time.

How do the attorneys know (or ensure) that the testimony their witnesses give will be as indicated above? How do they make sure testimony will be relevant to their case? That it will aid their case instead of destroying it? That the witness will have an experience that doesn't destroy him or her? No attorney who has carefully constructed his or her case wishes to jeopardize it by using unknown scientists giving unkown testimony in incompetent ways. And by the same token, no scientist wants to walk into a scene in which he or she feels and acts inadequately and is humiliated. Thus, a period of mutual preparation is necessary. How do attorneys and witnesses prepare for expert witnessing?

Different kinds of preparation for different actors

In general, attorneys and scientists who we talked with identified three major objectives or levels of preparation for testimony: psychological, strategic, and factual. Psychological preparation involves familiarizing experts with the nature of the courtroom and the adversarial process, and their own role requirements.

Strategic preparation consists of discussions or negotiations between lawyers and experts about the theory of the case and/or the nature of the testimony to be offerred. Factual preparation often occurs as part of these negotiations: it involves lawyers educating experts about the legal issues and local specifics in the case, and experts educating attorneys about relevant social science theory, data or research material.

The interview data suggest two generalizations about the preparation of experts. First strategic and factual preparation are truly interactive, both social scientists and attorneys do it to and for each other. Psychological preparation on the other hand, primarily is directed from attorney to experts. Second, new experts tend to be less active participants in their own preparation. Since they generally know less about the nature of the courtroom and the legal issues in school desegregation cases, they tend to receive large doses of psychological and factual preparation. The more experienced experts need less coaching and psychological preparation, and therefore can be more active participants in strategic and factual discussions with attorneys.

In Chapter 3 we discussed the kind of preparation Dr. Kenenth Clark received, and gave, as he prepared for testimony in the cases leading up to Brown, et al. In the years that have followed, the preparation process has become somewhat routinized. National level plaintiff groups have developed a team of experts who need little preparation in each case, except to familiarize themselves with local school peculiarites. Some defense attorneys, too, seem to have availed themselves of a coterie of scientists who appear in case after case. These "repeat players" (called by some "a dog and pony show") also need little repreparation in each case, although witnesses and attorneys who have not worked together before must accomodate to each other.

The preparation of attorneys

In terms of the legal issues involved, attorneys indicated that they prepared for the school desegregation cases just as they might for any other trial. Some attorneys, generally those connected with a national plaintiff's organization (NAACP, MALDEF, ACLU, Dept. of Justice) had had considerable experience in other cases of this sort, and their background preparation was greatly facilitated by this prior experience. In each local scene, they generally joined with local counsel, and relied on that person for background information about the community, the schools, characteristics of opposing counsel and the judge. Other attorneys, generally defense attorneys for the school board (or local plaintiff counsel), with no prior experience in school desegregation cases, had to study up quite a bit on desegregation law.

Regardless of their experience with school desegregation cases and trials, many of the attorneys had to prepare themselves for the experience of using social scientific experts as witnesses. They had to read what their witnesses had written, and often had to consider very carefully the record established by opposition witnesses as well. This often led to a good bit of work:

> Many of us attorneys read all the material we thought was necessary background. We read the Coleman Report which is awful, it is like Marx's Das Kapital, it is deadly reading. But we read it...as we thought it was important. We also read Moynihan's book on education that came out about that time. Some of us lawyers, myself chiefly, probably read a lot of background sociological material.
>
> In preparing for cross-examination of experts on the other side, you take their deposition, which we did for each and every one of them. Then we got their vita, we got the list on each and every publication that they had, and we got their views. And we got them to specify what they were on certain points. We got them to formulate an opinion on everything, everything that could possibly come up during the trial, so that if they changed one word of it we would hit them over the head with that page of the deposition.

In a number of cases, social scientific witnesses were quite helpful in shortcutting or expanding this process, in adding to the attorneys' knowledge.

> The truth of the matter is that they prepared us. Just by telling us what their positions were, in terms of educational theories that should be brought out. An expert witness, really because of their expertise, is not one that you would prepare like you would prepare any other witness. With these experts, you just really ask them hypotheticals, and also ask them to assume certain things. You ask, do you have an opinion as to the impact of this situation on the issue? And they just talk.

Not all of this preparation happened prior to the trial. In several instances, attorneys' preparation for cross examination of opposing experts was facilitated by having experts sit with them at counsel table. These scholars assisted attorneys by noting possible questions as the testimony developed. As several scholars noted:

> I sat in the courtroom and fed them questions to ask the opposing experts: I would run up to [the lawyer] and give him a question because the lawyers didn't know social science, and that's a problem.
>
> I am used in another way during the trial. When the attorney I am working with is about to cross-examine a very important witness for the school board, for example, he will have me sitting next to him or near (to coach him) and I will be writing questions. I can ask questions or write a question to really throw a witness in panic. For example, suppose a witness is reporting on the use of a particular kind of standardized test. I'll write him a note, to tell him to ask what was the reliability estimates or coefficients for that test at the time the test was administered? Did the sample include blacks and females? If I write that question out and hand it to him and he raises that question to the witness and they often go into the state of panic.

Psychological preparation of expert-witnesses

As mentioned previously, testifying in a courtroom is somewhat like acting in a drama. Any actor, especially the novice, must learn his or her role. With an unaccustomed script and role, a new actor has the potential of "losing his cool", of becoming flustered, nervous and inarticulate. In order to minimize the chances of such responses, the director (attorney) attempts to prepare the actor (expert) psychologically for the performance. In terms of the provision of expert testimony, such preparation may involve explanation of the reality, rules and procedures of the courtroom. As one attorney noted:

> ...It's a matter of preparing them for what the process is, and them giving them techniques that assure their survival, and survival as a whole person, within that context.

One expert noted, in turn:

> Especially in the begining, (my lawyer) would try to explain the rules of evidence and my freedoms and lack of freedoms when I'm on the stand. In effect, he would train me in the process of being a witness, which I needed in the beginning.

The price of non-preparation can be very severe, as noted by one expert.

> At that particular point, which I think was the first day, I didn't realize how ruthless these things are.

In particular, scientists and their attorneys agreed that scientists needed to understand the nature of the adversarial process that was the courtroom.[2] One attorney's comments in this regard include:

> We would first educate him/her on how the adversarial process worked. What I generally try to explain to people in that field (of expertise) is that they need to understand that the legal process of searching for truth and the academic process for searching for truth are entirely distinct and different. The legal process is adversarial and the academic process is cooperative. It's really not their job to find ultimate truth or to attain it sitting in the witness stand; their job essentially is to play a role in a play.

One cannot play a role effectively unless the entire play is understood.

In addition to general explanation of the adversarial situation of the courtroom, attorneys' preparation of experts often included more specific advice about how to prepare oneself psychologically to function as a witness. One scholar remembered his attorney telling him that:

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[2] In Chapters 6 & 7 we indicated that scholars did exercise considerable choice about how they played out their (adversarial vs. scientific) roles in court, but almost all agreed they needed to understand how the adversarial process worked in order to make effective choices. Adequate preparation may well have helped some scholars reduce the conflicts and tensions associated with courtroom testimony.

> Of course you've never testified before and you do have to understand something about the adversarial situation...The one thing you have to realize is that in an adversarial situation you cannot give a simple yes or no answer.

However, different attorneys may give different advice:

> I tell people to try to give testimony that is as direct and as responsive as possible - yes and no answers are best, however, not to the point of absurdity. On the other side of that point is to be aware of the question that is so deliberately vague or deliberately ambiguous that it promotes information that may lead to argumentation they don't want. I try to encourage short answers.

Some other examples of psychological advice scholars were given focus directly on the issues of controlling the attorney-witness interaction. Timing, and control of the verbal and emotional pace of testimony, appears to be a critical element in these attorneys' preparation of their witnesses.

> If you look the cross-examination attorney in the eye it forces him to participate in the battle of nerves. Timing is important in answering. Do not get rattled and take your time. Beware of trick questions and do not answer off the cuff.
>
> The most important advice I give people is to remember that your sense of time as a witness is distorted. The period of time in which you're not saying anything seems like an eternity, but it really isn't. You can stop and not say anything. That kind of timing or maintenance of the timing of the response is extremely important in surviving strong cross-examination. . .Whatever the question, no matter how innocuous it is, think of your answer in your mind before you say it and count to three.

Of course it is not always easy for the scholar to adhere to these suggestions, even if he wants to. One scientist remarked about his frustration, and the need to adopt controls over his propensity to "lose his cool", in the following terms:

> The next time I am under cross I am going to write up a card and I am going to put it in front of me where I can see it and it is going to say on it--Stop! And any time that I get a question that upsets me I'm going to stop and I am going to sit and I am going to wait until I have figured out what I am going to do and then I am going to answer. I am not going to be rushed and I am going to try to keep my cool. Somebody else would write "Be cool." I am going to have to write "stop" because "be cool" is not strong enough.

Some attorneys agreed that even the best preparation does not guarantee a smooth and unhassled performance. Ongoing assistance designed to reinforce these preparatory messages, were contemplated by several attorneys.

> It helps if the lawyer who has put you on knows how to protect you from attack that is not a proper attack. Well, if your witness is being badgered with lots of quick questions, not being allowed to finish, the guy is stepping on his lines and so forth, and then restating testimony, not quite the way he said it. . . . If the guy is not an experienced witness, an experienced trial lawyer who has put him on the stand is going to stand up and object, make the attorney ask the question, let the witness finish the answer. You say, "I believe that statement mischaracterized the previous testimony." You alert the witness to the games the lawyers play. To some extent you should have done that in advance but like any public presentation there is a certain amount of nervousness that takes place and you have got to figure that anyone is going to drop 30% of their preparation, it is just going to go, they can't even remember where it was. It is your job to go pick it back up and remind them of it and you can't do that only by waiting until you get to reexamine.
>
> The best technique that I know (to protect your witness during cross-examination) is to warn your witness. I guess it is not the most honorable technique, but to stand up and make an objection and say something in that objection that tips him off as to what is going on or where he ought to look out for it.

In addition to the provision of various kinds of advice, and promises of future support, the psychological preparation of witnesses proceeded according to other techniques. Some attorneys gave their prospective witnesses transcripts of other witnesses' depositions or copies of court testimony. In Chapter 12, for instance, we present and review portions of court transcripts of the cross-examination of several witnesses. Scientists anticipating testimony have been provided with like examples, permitting them to anticipate and prepare themselves for the rigors and techniques of cross-examination. Other scholars sat in the courtroom to hear expert testimony, learning from first hand observations what they might encounter. In addition, some scientists reported they talked to their colleagues who had testified, and asked them what it was like in the courtroom.

Efforts to role-play the actual testifying scenario also were reported by several scholars and attorneys. For instance:

> For the preparation for cross-examination we helped them anticipate all lines of possible cross-examination questions and tactics. We ran through it with them.
>
> What we would do is, we would role play, we would dry-run a case if we had time. The night before I testified, the lawyer would take me through the kinds of questions he was going to ask.
>
> Well I think it was simply a conference session where we would go through this direct testimony and play the devil's advocate type of thing and ask him very tough questions that we expected that they would ask on the other side. This is a fairly common way of doing that. We did that with each other in preparation for oral argument primarily before the appellate courts, because judges

> are known to ask some pretty searching and direct questions. In order to be prepared for those you have just about got to think about them in advance. Sometimes there wouldn't be an answer, but sometimes they would at least be prepared for the question and say I don't know, which is the best answer you can give if you don't know.

Another psychological principle is to encourage a posture of openness, a willingness to admit error or weakness. It is a general psychological "rule", believed by most, that unfortunate facts often have less of an impact if one raises them than if one waits for the opponent to raise them. A famous early example of this may be found in the defendant's admission in the Briggs v. Elliot case that the state of South Carolina did not operate an equal school system for black and white students before Brown (Kluger, 1975: 347-8). This admission substantially neutralized a whole series of experts Thurgood Marshall was prepared to examine on inequality in South Carolina Schools. One expert we interviewed emphasized this point:

> You want to know the knowledge in the field for you and against you, because you want to know how to argue something that you have to concede.

And several attorneys addressed this issue even more explicitly, stressing the preparation required to know what you have to admit to as a weakness ahead of time.

> If there is anything that is vulnerable, you don't want to wait until cross-examination. You want to take the wind out of the defendant's sails by asking about it yourself.

> You want to cover what they testified to in other cases. You always want to be careful if they testified to something that might be harmful, in another case, that would be harmful if it were brought up in your case. You would want to know about that. There is a lot of work involved in all that.

A correction to this rule is that a point may be particularly powerful if made during cross-examination rather than during direct examination. Many experienced attorneys noted that the biggest mistake a trial lawyer can make is to ask one too many questions on cross-examination. A skilled witness may be able to make a point more forcefully in response to a question on cross than can ever be done on direct. And the most skilled witnesses can rework cross examination questions to reinforce the direct testimony. As one lawyer noted:

> If the expert is skilled enough he can use the cross-examination for bonus points.

With good psychological preparation, witnesses may develop the skills to more effectively present their scholarly findings, and to be a more effective adversary.

Strategic Preparation of Expert-Witness

Unlike psychological preparation, strategic preparation is likely to be bi-directional. In this process experts are active participants rather than passive recipients. Such preparation generally focuses on two issues, the legal theory or approach being used, and the specific nature of expert testimony. The former only involves a selected group of experts, while all experts are involved in the latter.

Legal Theory or Approach. Most lawyers define the process of developing the theory of a case, or the set of arguments to be presented to the court, as a legal task that is beyond the realm of social science experts. Thus, they tend to exclude experts from the development of legal theory or strategy. However, on certain occasions experts can play an important role in this process. In Chapter 3 we presented Kenneth Clark's discussion of his involvement in various phases of the Brown cases. More recently, Pettigrew has commented:

> The legal and social science intellectual maps are sharply different...this makes "the fit" between them vital but difficult. Often the same legal point can be drafted in any one of several ways, all of them equally meaningful in legal terms, but only one of which shows directly relevant social scientific evidence. Likewise, the same social scientific conclusion can have diverse legal implications depending on its phrasing and content. Early involvement of the expert witness, then, allows this "fit" between the two fields to be made in the underlying fabric of the brief's argument (1979:6).

Several of the scholars we spoke with had been involved in such preparations:

> There are a number of issues in school desegregation cases that lawyers don't see that a good expert ought to see. If an expert is worth his or her salt in any kind of litigation, they ought to be able to point out areas that lawyers can cast in legal terms and I think that is where my help has been and the help of a good expert ought to be.

An expert who is involved with a case from its inception may be included in the development of legal strategy. Two groups of witnesses are most likely to be used in this manner: local experts and inner-circle experts. Local experts may be included early because of their accessibility and their knowledge of particulars in the local community. They often help construct bridges between legal points and locally available data, such as historical records incidents, etc. One such expert involved at this stage commented as follows:

> I was involved in over-seeing, advising and consulting on what kinds of data to get, how to put the data together. We had lots of sessions on what kinds of legal issues did they want to make and then we looked at what kinds of data are available.

A second group of experts who are likely to be involved in cases early on, and thus to participate in developing or refining the legal approach, are those in the inner-circle. The inner-circle is composed of experts and lawyers who have worked together on many school cases. They are repeat-players who are familiar with the issues and committed to the cause. Some of these scientists have not only appeared in court, but have prepared amicus briefs that have been presented to Appeals' and Supreme Court Justices. For instance, faced with the legal and scientific problem of demonstrating the precise effects of "incremental segregative effect," plaintiff lawyers reached out to the network or inner circle of pro-desegregation witnesses to consider the kinds of data needed to argue this point effectively in court. One by-product of this networking process was that several scholars prepared a brief in the Dayton-Columbus cases on appeal.[3] Faced with the legal strategy of arguing that school officials played a role in creating the housing segregation that exacerbates school segregation, key scholars tried to advance the state of knowledge in this area in several ways. In a special issue of the Annals of the American Academy of Political and Social Science (Roof, 1979), 7 of the 13 articles on "Race and Residence" were at least partly authored by scholars who had been expert witnesses in these cases. Moreover, requests were made to federal agencies for research funds to investigate this matter empirically, essentially to test or demonstrate the empirical validity of the famous "reciprocal effects" phenomenon.

Recently, defense attorneys in several cases also have begun to rely upon an inner circle of their own. The development of a defense network, and defense research relevant to the legal theory at stake in a case, also proceeded in a reciprocal manner, as described by one defense attorney:

> As we got closer to trial we began contacting lawyers for other school districts who had been through this. The lawyer for one of the defense lawyers in the __________ case had been a classmate of mine at __________ and was very helpful identifying what they would have liked to do in the way of social science evidence. We followed some of the leads that he had suggested and talked to a good many social scientists and everybody we talked to would give us the names of other people or would give us references to works that we might read. And we would send for their papers or whatever and read them and do a little preliminary investigation.
> We read and we judged and we tried to find answers. And we kept exploring and exploring and we finally settled on several experts from different areas, that we thought were just terrific with their approach to the field.
> Then we sought their answers good or bad, favorable or unfavorable, to our case that would provide solutions to these puzzles that we were presented with. And they didn't have any immediate answers. But they were interested in the field and they were interested in doing further research. And so I think, of course, we had to pay them for their time and I think that we enabled them to do research

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[3] This process, and the scholars involved, is discussed in Chapter 3.

> that they might not otherwise gotten around to doing without a grant or without some kind of assistance. And so we would brainstorm with them, either singly or as a group, to try to find out, just throwing ideas around from our experience suggesting hypotheses and we would come up with maybe 15 ideas and maybe out of that only one good idea would develop. They would shoot down various suggestions or theories that we made, and vice versa.

Effective Expert Testimony. While lawyers tend to view developing a legal approach as their province, in which only a selected group of experts can participate, strategizing about expert testimony is a shared task. At this stage of preparation, lawyers and experts negotiate about what issues to cover in testimony and which to leave out or side step. This negotiation typically involves a compromise between legal advantage and scientific honesty. In other words, expert testimony ideally represents evidence that supports a set of legal arguments and which, in turn, is supported by existing social science knowledge. Several experts describe those negotiations with their lawyer as follows:

> Yes we negotiate. The lawyers say 'here are the points we would like to make. We are looking for an expert witness who would agree to this kind of testimony.' I say 'Well I can go this way, but I can't go that way.' It is very honest and straight-forward. The lawyers understand about roles, pretty well. They don't have any problems with my saying I can do this but I can't do that.
>
> I went there the night before and sat up and talked at great length to the lawyers. They outlined the kind of questions they were going to ask me and I said, on this question there is nothing I could say that would be useful. I indicated to them the kinds of answers I would give.
>
> It turns out to be a negotiation process...I used the phrase as an alternative to consensus. It is 'a push and pull-a real negotiation process', and that's one of the reasons why the briefing preparation is terribly important. Occasionally you have to tell the legal counsel that no way will I give that kind of response to that question, or I'm not your witness on that point and you have to get some other witness if you want that point made. You place limitations on what you're willing to say or are able to say authoritatively. There are two kinds of limitations I make; first, it might be that you're being asked to say something which you honestly don't believe and as a professional person you aren't at liberty to do so. In other instances I honestly feel that my expertise does not cover that particular point of learning and I can recommend some other persons sometimes. Often I'm asked to testify to demographic data and I think that demographers are much better qualified to do that than myself and I'll tell that to the lawyers.

For their part, attorneys generally experienced the process of negotiation in a like manner. Several reports of similar feelings and situations follow from lawyers:

> One has to call the expert on the phone and discuss the desired testimony, what we are trying to prove, and ask him or her would she be able to testify to that conclusion. The conversation goes on to see in what way she would be able to verify and validate it, what exhibits would be useful to graphically illustrate that conclusion, etc.
>
> When I talked to him I asked several questions. What is this and what is that and what is this and what is that? What do you think about that? Is this a valid approach and is that a valid approach? I just asked him questions. And the answers that were favorable, we then worked into his deposition to some extent, and to some extent we fished around in his deposition. And he was very willing to talk about methodology, and very honest. And if anyone asked him to completely repeat everything I ever said to him, and he ever said to me, no one would be embarrassed professionally or in any other way. That is a much different process than hiring someone and sitting down and saying well if we use this approach we will get the number to 16; how about if we use that approach, will it be 17 or then it will be 15, well we won't use that approach. How about this approach? This is a different process. You work together as a team to advocate a point of view. And I'm sure that some of the experts sat down with some of the lawyers and say, 'no you better not get into that one, you better not look at it that way. Or if you get into this one you are going to get into that trap.'

As this lawyer indicates, this process is an exploration in teamwork.

The negotiations very rarely involve attempts on the part of attorneys to pressure their experts to say things they want to hear. Attorneys generally want their experts to tell the truth as perceived by the experts. Negotiations take the form of asking an expert what his answer would be to a hypothetical question, or whether he could make some given point. As indicated above, often an expert will respond that she cannot answer yes to question X, but that if the question were rephrased or altered in some way she would be able to answer it. Likewise with statistical and analytical methods, the lawyer will ask the expert to restate a finding in everyday language and the expert will indicate the connections, conditions and assumptions which must be made explicit in discussing research findings.

Factual Preparation of Expert-Witnesses

Lawyers and experts each have certain information that they bring to the case. The sharing and integration of this knowledge constitutes factual preparation. Much of this preparation occurs during negotiations about the legal approach to the case and/or the nature of an expert's testimony (strategic preparation).

Lawyers bring knowledge of the legal issues involved in the case and of the local community and school system. They consider the latter to be particularly important for experts.

> To be credible, the expert has to be able to discuss the school system intelligently. If he does that the judge will pay more attention.
>
> Make sure he is just as familiar as he can possibly be with the school district, because that is one thing that school board people often dwell on, this person is an outsider, right? So he has to be familiar as possible with the school district. The Court will take an opportunity to disallow an expert's testimony on that basis.

Local knowledge is especially critical for the expert who must use raw information to draw up plans, make calculations of white withdrawal, or analyze the residential patterns within the locality. Even when an expert's testimony is not directly based on local facts, however, some such information is important. Opposing counsel is likely to attack the expert as an outsider with no local knowledge and, therefore, nothing to contribute to the specific case. Attorneys are likely to encourage the expert to make as many visits to the jurisdiction as possible, and to ride around looking at the physical plant. As several attorneys noted: "We wanted the experts to say they spent a lot of time in town."

> For our preparation we wanted them (the experts) to know as much as possible about the physical facts of the case, i.e., the number of classrooms, the proximity of schools, the availability of transportation, etc.

In addition, experts bring two other kinds of resources. First, all experts bring the general methods and substantive knowledge of their discipline. This includes statistical and other analytical procedures for aggregating and analyzing data, and a general knowledge of research results in the field. The second resource which some experts bring is the results of specific research they have conducted, for example, a study on achievement gains in some other desegregation setting. The lawyers must achieve a minimal mastery over these materials if the examination is to be successful. This may involve reading what one's witnesses has written on the topic of their testimony - sometimes everything.

In some cases the attorney's factual preparation of a witness takes the form of asking the witness to carefully think through his argument, to make sure he has accounted for all the possible arguments, and gathered all the relevant theory and/or data before coming into court. As one lawyer described the process, it was not quite like a negotiation, but rather an exploration of the factual evidence and arguments at stake.[4]

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[4] This particular discussion, or series of discussions, was done on the telephone. Depending upon travel costs, and degree of prior acquaintance, this was not an unusual medium for preparation.

> I would ask a question and say, OK what do you think, and most of this was by phone. He would give his answer and then I'd say but how would you explain X? And he might say, well I hadn't thought of that, let me think about it. And then he would think about what body of knowledge he had at hand to address that question. I will not tell them what to say. I just want to know what they're going to say to that question.

As we indicated, factual preparation often is bilateral. On occasion, experts engage in teaching the lawyers about relevant social science materials. One scholar comments:

> Your role is to teach him social science in one day. In each case my time is spent 100% trying to teach them. Because I do quantitative research, basically I try to teach them statistics.

And as two lawyers remark:

> We would make sure we understand [our experts] exhibits and the general principles behind their research.
>
> I grew, in terms of my own thinking about the problem. The more I talked, I just kept learning and learning and crystallizing what I thought more and more and more. It really helped me, not only in his preparation, but it helped me tremendously in the cross-examination of the other guy.

The Style and Depth of Preparation

In sum, preparation generally involves psychological, strategic and factual elements. What we have outlined, however, is by way of an ideal preparation. Our data indicate that attorneys vary substantially in terms of both the depth and style of their preparation of witnesses. At the extremes of the former, consider these two reports from lawyers we interviewed:

> We didn't have any preparation. They were on their own.
>
> Our preparation was a two man job. For the first couple of weeks we took a couple of days each week and discussed the theories and facts of the case, and then the next few weeks for the same amount of time, we went over the direct testimony, and then the next two weeks the cross.

Variation in style matches variation in depth, as witness the following contrary observations:

> We spent many hours with the witnesses in preparation. We did not ad lib. We used the twenty questions format.
>
> For our preparation we do not coach them on questions. We send them data and have dinner with them. We never go to a twenty questions format, they don't need that crutch.

What accounts for these variations in depth and style of preparations? Table 10.1 indicates considerable agreement among attorneys and scholars that plaintiff witnesses received more preparation from their lawyers than do defense witnesses. Fifty five percent of the plaintiff attorneys said they gave their witnesses a good deal of preparation, while only about 36% of the defense attorneys said so. In a congruent finding, 69% of the plaintiff witnesses reported they received extensive briefings from their attorneys, combining aspects of the three forms of preparation discussed in this chapter. Defense witnesses, however, reported extensive briefings in only about 55% of the cases.

Table 10.1

Attorneys' & Scholars' Reports of the Preparation of Expert Witnesses

	Preparation of Experts		
	Extensive	Minimal	(N)
Reported by: Plaintiff Experts	69%	31%	(32)
Defense Experts	55%	45%	(20)
Report by: Plaintiff Attorneys	55%	45%	(20)
Defense Attorneys	36%	64%	(14)

The data also indicate that the more times experts testified the less often they received extensive briefings. Almost 70% of the experts who testified 1 or 2 times reported receiving extensive briefings: only about 55% of the scholars testifying in three, four or more cases reported they continued to receive extensive briefings. In these latter situations, apparently, experts had already worked out with their attorneys the mechanics of their testimony, and needed only to be brought up to date on local legal or evidentiary specifics.[5]

At the extremes, depth of preparation appears to be related to resources. Those attorneys who did little by way of preparation were either local plaintiff lawyers who were trying a case while maintaining a regular law practice, or a few defense lawyers who saw little real use for expert testimony. Once we move away from the extremes of little or no preparation, however, both depth and style appear to be related to the experience of both the lawyers and the experts. At one end of the spectrum are lawyers who have tried several desegregation cases before, using the same experts repeatedly. While weeks or even months of effort may have gone into shaping the expert's testimony over the years, for a specific case there are only limited exchanges between lawyers and scientific experts, and these exchanges are of general "we will ask you about these issues" character. For instance, as one well-traveled expert witness recalled:

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[5] This general relationship between experts' experience and extensiveness of preparations was maintained regardless of the party for whom testimony was being provided. Since defense witnesses in general received less preparation, this finding is attenuated among experts who testified often, but the small sample size prohibits any more firm discriminations. Repeat players, for plaintiff or defense, received less extensive preparation than first or second time testifiers.

> (The lawyers and I) developed a genuine rapport: they knew where I was coming from and I knew where they were coming from. We got to where I could arrive at the airport, drive to the hotel, meet them there, and go immediately into the deposition. They would have sent me materials in advance, but we had no rehearsal of any kind.

When the expert and lawyer are new to the desegregation arena, or to each other, however, the preparation is likely to be more extensive in nature. The difference is not unlike a teacher giving a lecture for the first and tenth times. The first time, things are done in detail and it is likely one will proceed with voluminous notes. The tenth time, however, a cursory review and notes highlighting the main points often suffice. As in the classroom, while the first preparation may appear to be more thorough, it is often the tenth performance which is superior. The experienced teacher, like the witness and counsel, is not over-burdened with facts, figures and extraneous points. He is better able to focus upon the two or three main points to be made.

These last few observations take on significance when we note that in school cases it is the national plaintiff counsel and expert who are most experienced in these tasks. These plaintiffs' witnesses generally need less psychological preparation, for they have been in the courtroom before. When it is your tenth performance, rehearsals are superfluous. The factual preparation, interaction and negotiation has been going on for years, and the lawyer and expert have an intuitive feeling for the line of testimony.

If the reasons for using experts are simply to testify to the local realities, not much legal preparation is necessary. . .the expert merely has to get the data together and present it. However, if what is needed is a coherent empirical and theoretical argument to alter judicial conceptions of the nature of the case, or of racial and educational matters generally, more extensive preparation is needed. Thus, the more complex the legal strategy and argument, the more preparation is needed, at least for first timers. As indicated in Chapter 9, plaintiff attorneys clearly felt their case was more complex, and thus their witnesses needed more preparation. Recently, however, defense attorneys feel their case has become more complex as well, and perhaps now these witnesses also are being prepared more vigorously and completely. Certainly, as some of the quotes indicate, many scientists now are being drawn into and used as resources in the bilateral development of the legal strategy, or at least the integration of legal theory and scientific data.

With psychological and factual preparations well in hand, more time can be devoted to strategic considerations, to the best integration of social science evidence and legal theory.

CHAPTER 11:
CHARACTERISTICS OF A "GOOD WITNESS"

> It should be pointed out that the Court, in considering the testimony of the experts, gives greater weight to those experts whose opinions were to the effect that equality of educational opportunity would flow from the consolidation of schools in the metropolitan area, and that the proposed plan is both reasonable and feasible, than to the testimony of those whose opinions differ. In considering the weight to be given to the testimony of all of the witnesses, the Court has considered their qualifications, experience, interest or lack of same in the outcome of the litigation, their bias if any, as well as their actions upon the witness stand, and the weight and process of the reasoning by which they supported their respective opinions and testimony, and all other matters which served to illuminate their statements.[1]

In delivering his findings in Bradley vs. Richmond, Judge Merhige indicated his reactions/evaluations of the expert testimony he heard from social scientists. Moreover, he noted the kinds of characteristics of expert witnesses that impressed him, and that potentially influenced his willingness to believe and/or seriously consider their testimony. The above quotation stresses experts' qualifications and related experience, the strength of their reasoning, their stake or interest in the decision, their biases, and "all other matters". In this chapter we examine scientists', attorneys' and judges' views on what makes a good witness.

General Characteristics of a Good Witness

The most basic characteristic of a good expert witness is his or her credibility. For instance, in discussing the virtues of the hearsay rule on evidence, the proverbial law school teacher asked the class to imagine a lawyer who had the devil as a key witness. He was so dupliciticus and unbelievable it was clear the judge and the jury would immediately see through any testimony he might give. The lawyer, therefore, put the devil in the basement of the courthouse and wired him to an Episcopal Bishop who he put on the stand. The lawyer asked questions which were played down to the devil, and the devil whispered his answer into a microphone which surrepticiously went to a speaker hidden in the Bishop's ear. The Bishop then gave the court the devil's answer. And who is going to fail to believe an Episcopal Bishop? The role is synonymous with credibility.

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[1] MEMORANDUM, U.S. District Court for the Eastern District of Virginia, Richmond Division, Carolyn Bradly vs. the School Board of the City of Richmond, Virginia. 1/15/72. Judge Merhige (p. 89).

The hearsay rule, of course prohibits such actions, but the problem of credibility which underlies the story is crucial in the use of expert witnesses. Like the Bishop, the well-spoken expert may appear credible when there is very little data to support her argument. And, perhaps like the devil, an expert may be so lacking in the credible appearance of a witness that a basically sound body of evidence will be disregarded. To find an expert who at once has the stylistic attributes of a good witness and who has valuable evidence to contribute is of course the goal. But as one of the lawyers we interviewed noted, "a credible witness is hard to find."

That, of course, doesn't keep people from looking. We asked lawyers and experts to name the attributes which make an expert credible. In general, lawyers and experts named the same factors; they more or less agreed about the characteristics underlying effective or credible witnessing. Moreover, the interviews suggest credibility may be broken into two interrelated factors: a) the general knowledge, background and experience of the expert which constitute the substantive base of his or her expertise, and b) the style and demeanor of the person, the appearance and art form of expertness. The two factors clearly are related, for a totally uninformed expert is less likely to feel comfortable on the stand, and therefore less likely to make a poised presentation. But they are not synonymous, and both have to be weighed carefully. As one of the judges we spoke with noted:

> Perhaps you are impressed with the credentials and expertise of a particular witness. I tried to listen to all the evidence, but there are always some witnesses who weigh their knowledge their expertise, differently. They appear to be more credible than other evidence or other testimony.

After all, in many instances expertise is equal, or is equal at least as far as the lay observer (including the judge) can tell. One judge indicated how hard it is to deal with opposing expertise.

> This is our daily problem, a choice between two experts, both perhaps exceptionally trained, and both with many skills and experiences. One expert tells us one thing and another seemingly equally qualified expert testifies to the contrary. It's a difficult problem and if we're overwhelmed by a mass of statistical data somebody still has to make the choice. It's the judge in a court case, and the integration cases are all court cases and not jury cases. The judge has to make that choice. It's not always easy, but somebody has to make a decision.

If expertise is equally divided, expertness, or scholars who "appear to be more credible", may make the difference.

Let us turn to a more detailed discussion of the kinds of characteristics lawyers and scientists associated with "good witnesses". In Table 11.1 we report their responses, and group them according to whether they address matters of technical knowledge (expertise) or skills and tactics of presentation and style (expertness).[2]

Table 11.1. Characteristics of a Good Witness[3]

Characteristics	Mentioned by scientists (N = 43) Number	Percent	Mentioned by attorneys (N = 49) Number	Percent
Expertise				
Have good credentials	5	5%	18	10%
Have good data/experience	7	7	14	8
Know the local area	7	7	26	14
Expertness				
Communicate clearly/specifically	11	11	25	14
Don't use jargon or highly technical materials	11	11	9	5
Stay within area of expertise	11	11	14	8
Admit ignorance	6	6	12	6
Don't be adversarial	14	14	6	3
Maintain integrity	12	12	15	8
Don't get rattled or hesitant	8	8	19	10
Be courteous	3	3	21	12
Respond to questions	5	5	4	2
Total	100	100%	183	100%

Before discussing the data in this table, it is important to draw attention to the number of persons who answered the questions (43 scientists and 49 lawyers), compared to the number of "full and complete" interviews previously identified. A careful re-reading of the interviews indicated that 3 attorneys and 11 scientists never were asked about general characteristics of good witnesses. Some did discuss specific witnesses, but not the general question. We have corrected for this by-product of non-standardized interviewing by listing in the table marginals the actual number of informants who were asked the relevant question.

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[2] In asking this question in the interview we did not offer the options reported in the table, nor did we prestructure the responses. The two major categories of "expertise" and "expertness", as well as the characteristics within each category, emerged from our reviews of the interview material.

[3] The figures in each left hand column indicate the number of times a charactertistic was mentioned: the right hand column indicates the percent of all responses for each characteristic represented. The chi square statistic comparing the distributions of attorneys' and scholars' responses in the two major categories of "expertise" and "expertness" was statistically significant. (X^2=4.56, df=2,$p < .05$).

With this in mind, several aspects of the data in Table 11.1 draw our attention. First, there is a substantial difference in the total number of characteristics mentioned by scientists and by attorneys: attorneys answered with more details than did scientists (3.7 characteristics per informant for attorneys vs. 2.3 per informant for scientists). By examining the percent columns, we can review differences between scholars and attorneys without respect to the total differences in the number of responses. Attorneys more often mentioned characteristics related to expertise (32% of all responses compared to 19% of the scientists'), especially having good credentials and knowing the local area. Perhaps scientists assumed their expertise is of high quality, and therefore not a particularly noteworthy issue; attorneys may still be checking out these characteristics of their witnesses. Although there are few differences on the expertness dimensions, scholars more often appear to emphasize not being adversarial (14% to 3%), not using jargon in court (11% to 5%), and maintaining integrity (12% to 8%). Attorneys, well accustomed to the nuances and style of the courtroom, more often mentioned being courteous (12% to 3%).

Table 11.2 presents a breakdown of the attorneys' responses, by party represented.

Table 11.2

Characteristics of a Good Witness,
as Mentioned by Attorneys

Characteristics	Mentioned by Plaintiff (N=25)	%	Mentioned by Defense (N=24)	%
Expertise				
Have good credentials	11	10%	7	10%
Have good data/experience	10	9	4	6
Know the local area	13	11	13	19
Expertness				
Communicate clearly/specifically	14	12	11	16
Don't use jargon or highly technical materials	7	6	2	3
Stay within area of expertise	11	10	3	4
Admit ignorance	6	5	6	9
Don't be adversarial	1	1	5	7
Maintain integrity	7	6	8	12
Don't get rattled or hesitant	14	12	5	7
Be courteous	17	15	4	6
Respond to questions	3	3	1	1
Total responses	114	100%	69	100%

Plaintiff attorneys mention more characteristics than defense attorneys (4.6 per plaintiff informant v. 2.9 per defense informant), and also appear to stress some different specific factors. Given the difference in total number of responses, the equal number of times "knowing the local area" was mentioned indicates a relatively greater (% of total responses) emphasis among defense attorneys. This is intuitively reasonable, since defense attorneys are most likely to focus their concerns upon specific local features, and to find scientists who can testify to the absence of segregation, or of the intent to segregate, within the local school system.[4] On a percentage basis, defense lawyers are more likely than plaintiff lawyers to stress the importance of witnesses admitting weaknesses or ignorance, not being adversarial and maintaining their integrity. In Chapter 7, we indicated that defense witnesses more often elected to adhere to social scientific than legal-adversarial norms in the courtroom, a posture consistent with these legal preferences. Plaintiff attorneys also mention these attributes as important, just not as often as defense attorneys. In turn, plaintiff attorneys more often stress the need for courtesy, for staying within one's area of expertise, and for witnesses not get rattled or hesitant under pressure, Finally, when these data are examined to discern differences between local plaintiff attorneys and their nationally-based colleagues, we find no important differences in general, nor in specific emphases.

Scientists' responses to these questions about characteristics of good witnesses are examined further in Table 11.3. In general, plaintiff witnesses mention more characteristics than defense witnesses: the plaintiff mean is 2.4 responses and the defense mean is 2.1. While it is hard to determine the meaning of any variation in specific responses in a table with such small numbers, the defense scientists do more often mention the importance of maintaining integrity (as did defense attorneys).

When the responses are recategorized in terms of the amount of experience witnesses had in testifying, some patterns are evident. First time witnesses more often stress the avoidance of jargon, staying within one's area of expertise,

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[4] These emphases of a defense approach are discussed in Chapter 9, and set in a more general context in Chapter 2. In addition, in Chapter 12 we examine the ways in which defense cross-examinations of plaintiff's witnesses often focus upon their (lack of) knowledge of the local area.

Table 11.3

Characteristics of a Good Witness, as Mentioned by Scientists (By Party & Experience)

	Party				Experience at Testimony			
	Plaintiff		Defense		Appeared Once		Appeared More than Once	
Characteristics	(N=27)	%	(N=16)	%	(N=23)	%	(N=20)	%
Expertise								
Have good credentials	3	4%	2	6%	2	4%	3	7%
Have good data/experience	5	8	2	6	4	7	3	7
Know the local area	5	8	2	6	3	5	4	9
Expertness								
Communicate clearly/specifically	7	11	4	12	6	11	5	11
Don't use jargon or highly technical materials	7	11	4	12	8	14	3	7
Stay within area of expertise	7	11	4	12	9	16	2	4
Admit ignorance	5	9	1	3	2	4	4	9
Don't be adversairal	10	15	4	12	10	18	4	9
Maintain integrity	6	9	6	17	5	9	7	15
Don't get rattled or hesitant	6	9	2	6	3	5	5	11
Be courteous	2	3	1	3	2	4	2	4
Respond to questions	3	4	2	6	1	2	3	7
Total responses	66	101%	34	101%	55	99%	45	100%

and not being adversarial. Repeat players more often mention maintaining integrity. One interpretation of this pattern, potentially consistent with the difference between anticipated and actual discrepancies reported in Chapter 6, is that the hallmarks of a good witness may appear at first to lie in not being adversarial, staying within one's own area, not using jargon, etc. The experienced witness may understand, however, that the real issue is integrity (and perhaps coolness under fire); if integrity is maintained and demonstrated, other accoutrements of style may be less important. Thus, for the experienced witness, jargon may at times be useful, and going outside one's credentialed area of expertise may be acceptable for an acknowledged expert. But integrity, its actuality and its appearance, may remain the key to credibility.

These general patterns of responses by lawyers and scientists, and within each group, hint at important differences in ways various parties and professional actors view the acts and consequences of expert witnessing. Just as importantly, however, there appears to be substantial agreement about some of the general features of "good witnessing". We now turn to an examination of each of these characteristics in greater detail, utilizing the words and analyses offered by the actors themselves.

Expertise

Expertise is factual knowledge in a field. This knowledge is first demonstrated in a courtroom through the presentation of credentials.[5] A credible expert witness needs an advanced degree, usually a Ph.D., and publications in the area. It is of additional value if one has data or has conducted research on the specific issues under discussion (e.g. studies on white flight), or has had experience working with these issues (e.g. administered a school, drawn up desegregation plans). Ultimately, an expert is one whose peers believe him or her to be an expert, and this peer reputation is developed and validated through degrees, publications and research grants.

One potential exception to this general statement concerns the question of local knowledge. The great majority of courtroom experts are not from the immediate area under litigation. Thus, their knowledge of particular facts and conditions in local schools is quite limited.[6] A credible expert often has to take some steps to acquaint herself with the particular school district, and perceptive local attorneys often will help prepare their witnesses on this dimension.[7] Defense counsel, in particular, is likely to stress the importance of local knowledge, as we have seen in Table 11.2. However, local knowledge is much more important for some witnesses than for others. Plan writers especially, and witnesses testifying to school board intentions, must be able to exhibit local knowledge if their expertise is to be believed. Researchers testifying to equal status interactions, or educational harm, may not need to tie their testimony so clearly to the local area.

Several judges indicated their concern with these same issues of expertise. For instance, the importance of scholarly credentials is expressed by judges in the following terms:

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[5] Such as those listed in the extracts of briefs presented in the opening pages of Chapter 10.

[6] As indicated in Chapter 4, this emphasis often creates a dilemma for scientists, whose reputation and rewards from the scholarly community tend to stress more generalized and theoretically sophisticated studies, rather than a focus on local problems or practical nuances.

[7] See our discussion of factual preparation in Chapter 10.

> Well, I consider all of his educational training, all of his experience in employment and whether I'm convinced he really studied the matter.
>
> I'd like to know how long he's devoted himself to studying the problem.
>
> If you have to highlight something, it's best to highlight it with the strongest witness you can, as strongly as you can. When you have a man who comes out of Washington, and has a background in this, whatever is there, it seems to me, will be more impressive than if you had some second year student from the University come out and tell me.

Judges also addressed the problems of generalizable experience and knowledge, as well as the need for specific information about the local area. The following comments are from judges who were impressed by generalized and comparative knowledge, as well as by witnesses' ability to connect it to the local situation.

> We're in new areas all the time and so we don't have the expertise, and we're finding our way and perhaps groping. We have consultants and a number of traveling experts who have been helpful too. They've testified in five maybe six cases and their testimony has been accepted, and I think this is probably true of some of the special consultants as well. They work perhaps in New York or they worked in Florida or they worked in California, and they can modify their recommendations according to the problems of the particular area.
>
> I thought some of the testimony was highly relevant and helpful. I thought X was helpful when he was able to look at our system and suggest some other ways this could have been done reasonably, which the board could have reasonably been aware of. I thought some of Y's studies concerning what happens when a school turns black in a neighborhood was interesting. It showed the reciprocal effect. And I thought our local people who were the longtimers here, and who had some actual data on what happened in this town, were extremely helpful in how the suit developed.
>
> You not only have the data involving the school system, but you had by way of comparison the data involving other large school systems around the country.

The next two comments from judges emphasize local relevance and experience to a much greater degree.

> Credible social science must be by a local person who knows the situation. However, a social scientist was more credible when he was far enough away from home so that no one knew him.

> The more you know the more you are able to make decisions. In this case the one person who really studied the community thoroughly before he ever came to court made the most sense.

In the final analysis, the key issue on expertise is that the evidence must make sense to the judge. It must make "common sense" on its own terms, and in the mind of the judge. In the following reports, judges reflect on how they assessed witnesses' expertise, how they balanced the different kinds of information presented.

> The defense witnesses showed little regard, if any, toward the choice of neighborhood living related to the factor of a given school. They're certainly valid people and have given this a tremendous amount of study and research. But I thought it was a highly important factor which they didn't give enough consideration to. Whereas, on the other hand, the plaintiffs had several well qualified experts, other than sociologists, who testified that in their experience in the real estate field, schools played a very important part as to where folks wanted to live and where they wanted to move to and move from.

> It makes some sense. My life experience tells me that is true. My life experience tells me that I am capable of doing a hell of a lot more because I can pick up the phone than if I were to come could into an area and spend a year or two developing contacts. If I have a contact which I have developed at school or in my neighborhood or so on, then my life's chances, that is his phrase, are immeasurably enhanced. I think he is right.

> Obviously what is important is the feeling I get as to whether what he says is sensible. Common sense plays an important, in fact a vital part, in any trial. And I try to use my common sense the best I can to as whether that expert makes sense to me and whether the reasons he gives for his conclusions make sense.

Expertness

Given these comments on expertise, it is not surprising that. when asked what makes some witnesses more credible than others, most lawyers, judges and experts dwelt upon the issue of style and demeanor. It is here that the adequate and the good witness part company. Most experts have expertise, at least at the level of formal credentials and experience, but not all have similar expertness in court. An adequate knowledge base is only a small part of the style or "art" of witnessing. The best informed witness can "fall out" while the poorly informed witness can sometimes make a good account of himself or herself on the stand. What are those elements of style which lend credibility?

Clear communications and jargon. Like all experts, in all walks of life, scientific experts often are distrusted by laity not conversant with their special language and assumptions. Physicians speak of contusions and abrasions instead of cuts and scratches; lawyers speak of parties of the first and second part instead of you and me; and social science experts speak of multiple regressions and correlations instead of probable cause and probable effect.

The first element of a good style is to translate the special language of the discipline into words and ideas which reside in the working vocabulary of lay persons (in this case judges and lawyers). A number of experts underlined this as a key characteristic of a good witness.[8]

> I purposely refrain from using academic jargon. I try to talk in language the judge will understand and I refuse to get involved in detailed methodological questions that I think are of no value or interest to the judge.
>
> My own feeling is that social scientists should try to be as accurate as they possibly can, while couching it in language the judges will understand.

The lawyers agreed with the link between style of witnessing and communication skills.

> A good witness is clear and articulate and does not use scientific lingo, so any intelligent person in the field can understand what he is actually saying.
>
> A good witness is someone who can communicate with lay people and is not someone who is going to couch everything in technical jargon.

Several judges commented on the issue of jargon as well.

> Oh, I had a lot of fun with cohort group. I had some trouble with multiple regression analyses and finally I figured out that what you do is you freeze the factors and work on one factor. When I realized that it was elementary.
>
> I just wasn't impressed generally with the evidence because it's in such hypothetical form, and we're talking about 'if this' and 'if that'.

---

[8] There also are occasions where experts purposefully may use jargon to obscure issues raised by opposing attorneys that they feel are harmful to their testimony/side. As one scholar noted, "I sat in when (X) was being cross-examined and I thought he was helpful except when someone asked him a question that would hurt his side. Then he lapsed into jargon so no one understood him."

> Maybe I didn't understand it as well as I should, but I thought I understood it. I just thought the whole idea created too much uncertainty and I just wasn't impressed with the evidence.
>
> Well I think they got down to earth better and laid things out a little more simply and a little more understandably.

Some jargon is simply that, jargon, serving neither clarity nor brevity of expression. Other sorts of expert language, however, do serve such functions, and to abandon it for "lay language" and ideas is to engage in simplification and to invite absurdity. Some experts we spoke to reported a refusal to abandon such terms and understandings. Not surprisingly they have not been frequent testifiers.

Adversariness, admitting weaknesses and maintaining integrity. The expert brings one critical attribute to the court which poses a great threat to her credibility: she typically is one party's witness. Thus, every expert is expected from the start to testify in a way that will advance the interests of the party who called her, and to attack or rebutt points made by the opposition. It is not uncommon to hear judges, lawyers and indeed social scientists speak of some experts as "hired guns" or "whores". And it certainly is in the interests of opposing counsel to project this image of the other side's experts whenever possible. A substantial number of the characteristics mentioned by lawyers and experts about expertness relate to issues of adversariness and integrity.

It is perhaps surprising that under these circumstances any expert can be credible, and indeed there are some judges and lawyers who believe all experts are simply "hired guns". However, according to lawyers and experts, expertness can be enhanced if the expert can indicate that he or she is not simply supporting a side regardless of the facts or merits of the case. As one expert notes, the key is to "maintain your integrity and neutrality." Another expert concurs:

> It seems to me that if you're going to have any credibility at all, you've got to tell the truth as well as you can.

And a judge argues:

> Credibility comes from a balanced approach. Where every answer supports the person who hired (the expert), you get suspect.

The tenuous balance between partisanship, neutrality and credibility is captured by a lawyer.

The expert should not appear to be the adversary.

Perhaps the key term in this regard is to "appear". It is one thing for the judge to weigh various pieces of information to assess their logic and consistency, and to see if anything has been omitted. It is quite another matter for the judge to try to determine a witnesses' partisanship or neutrality. However, judges do try to do it, because the issue of witness partisanship also is important for them. As these judges' comments indicate, it is not easy to weave one's way through testimony and to ascertain inappropriate adversariness.

> You use the traditional tools in any evaluation of a witness. How the witness appears on the stand, whether or not his demeanor suggests he is speaking truthfully, just like you'd believe a person in ordinary life. I don't think that any of the witnesses in our case were lying; everyone was telling the truth from his perspective. What a judge in a case like that is trying to do is to say 'What is this guy really getting at? I know he's from the university, but what kind of axe does he have to grind?' That's not too difficult for me. Well, it's always difficult for any fact-finder, you never know whether you're viewing people correctly. But after all the experience I've had watching people on the witness stand, I get some perception of what's happening.
>
> Another factor is his relationship, if any, to the parties or to the subject matter involved. Another thing is what studies he's made and what he's said in other situations ...I also consider whether possibly he has any interest in the outcome of it, which in a case like this they wouldn't only abstratcly.
>
> Well, listen I am not a maiden on desegregation cases. And secondly I am not a maiden when it comes to witnesses. You know, you get to the point after a while when you develop your own attitude about what you think is plausible,what you think isn't plausible. After many years now, and some varied experiences, you get to the point where you recognize what is advocacy and what it is based upon. The problem with all witnesses is you have to be very careful in finding your basis, your assumptions. Once you determine what the man's assumptions are you don't have to listen to the balance of the testimony. You know exactly what is going to happen. You do that when you read academic papers. You know where he is coming from and if you feel this is the same old stand you know goddamn good and well by the time you get to the end of it what the answer is going to be.

And in an extreme case...

> Either the Rockefeller or Guggenheim foundation has picked up this fellow (ex-superintendent or scientist) and as a public service they would send him to confer with local school boards. We had to hide him in the hotel. He didn't come to a meeting and confer with us, but the Superintendent and I (before I was a judge) and two other board members went over. He was a traveling troubadour paid for by liberal foundations, at least in those days, come to keep the peace.

What these judges are reporting is a series of criteria for assessing certain aspects of expertness, especially with regard to adversariness. Their comments stress an inquiry into a witness' special "interest in the outcome" or "axe to grind", but they also touch on "demeanor", apparent "advocacy", etc.

Under these conditions, it obviously is important for witnesses to avoid outright advocacy or its appearance. The most frequently used tactic in appearing non-adversarial is to admit weaknesses in one's position and to admit ignorance when one doesn't know the answer to a question.[9] Several lawyers stressed this tactic as follows:

> A witness will hurt the credibility of his testimony if he never budges from his stance in court.
>
> A good witness will say 'I don't know' when he doesn't.
>
> I felt (X) was ineffective on cross by refusing to admit simple things, though appearing not to give an inch on anything.

Judges commented on the same issue in their interviews. Obviously a key element in an expert's credibility is whether the judge feels the witness is being "fair", and admitting the possibly negative or unsure aspects of their own position certainly gives that impression:

> The ones who weren't good witnesses were the ones who obviously refused to consider the possibility that they may be wrong in their conclusions, that their data base is wrong, or that that particular factor they are considering is wrong. For example, I thought (X) really believed what he was doing, besides making money out of it. But I felt that here was a man who was blind. He couldn't bring himself to say that this was a racist thing... white withdrawal based on intolerance.

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[9] In Chapter 10 we reported that some lawyers prepared their witnesses on precisely this point. Whether the resultant behavior is truly non-adversarial, or only strategically so, is hard to determine. In Chapter 7 we discussed the particular problems of strategic behaviors of this sort, and their analysis in the determination of a scholar's overall normative stance.

> (Y) was a little guilty of that too. (Y) was kind of single-minded about how white flight could be minimized, and was one way about it.
>
> He did what he could within the limits he had. But to come out with the conclusions, as strong as he did, discredits them in my eyes anyway. Now that is why I was fond of the other guy. I thought he knew where he was coming from. I had read most of what he had done. When he comes on and talks about it, he admits the possibility that you have to make a choice. You are faced with white flight. The method of desegregation which minimizes white flight most effectively is voluntary reassignment. Well, everybody knows that. But some guys won't go to the next step and say how much desegregation will get you if you do that. The other guy took the next step. He said, you won't have much white flight, but you also won't desegregate anybody. And when he tells me that, my responsibility becomes very strong.

Here, however the expert must walk a fine line, for the reality of the situation is that she is a party witness. Her effectiveness as a witness for a party will be limited by presenting all sides of every issue with equal force. However, she will be no more effective if she loses credibility due to a blantantly one-sided presentation. Once again, "good witnessing" rests on balancing partisanship and neutrality. This is how two lawyers describe the tension:

> He (the expert) has to be willing to concede points, but in the opposite spectrum he cannot be malleable as putty, which makes him utterly useless. He can't be afraid of offending anybody.
>
> Tell both sides, but stress one side.

Clearly the "perfectly neutral" witness would serve no one's cause and would be unlikely to be called by a party at all. A witness must be effective for a party or she is useless.

Don't get rattled or hesitant, Be responsive. The greatest risk to proper style comes during cross-examination, and it is here that the expert must not become rattled but must remain cool and responsive under fire.[10] Two scholars point out some of the difficulties of demonstrating these characteristics.

> It's very difficult to maintain neutral expertise (during cross-examination) when one's results and data are being challenged.

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[10] In Chapter 12, we discuss the issues and strategies of cross-examination in more detail.

> I didn't enjoy cross for a single moment, because of what (the opposing attorneys) were trying to do. I really detested it. (The opposing attorneys) had to find whatever weaknesses there were (in my data) and play upon them and blow them out of all proportions.

Attacking credibility is the cross-examiner's stock and trade, and experts must understand and effectively manage such attacks. As one expert commented:

> You just can't give up simply because (the opposing attorney) is bearing down on you, because that is what they are going to try to do. It is the lawyer's job to somehow get you to agree that you didn't say what you said.

Under such circumstances, total neutrality may harm credibility, especially if the appearance is one of hesitancy or of a person with no opinion. Opinions, honestly and forthrightly delivered, are what experts are for. As several experts put it:

> Do not be too extreme in your testimony or it will hurt your credibility as an expert witness. Instead take the middle of the road. However, take a stand, and do not be cloudy by answering too many questions with 'I really don't know.'

> The world is very complex, but the courtroom requires that if you are going to be effective...act as if the world is simple. Answer questions in yes and no terms.

To manage the attacks on their credibility, witnesses must understand that they are not purely neutral parties to a neutral inquiry. They are affiliated with one side in a litigative contest, and even if that makes no difference to them, it does to the other actors involved in the dispute. Crucial to this understanding is the fact that the opposing attorney is an adversary.

> And (the opposing attorney) can ask you any question he wants to. And no matter what he throws out, its got to come back in a format that makes the lawyer sorry as hell he ever asked you that question.

Social scientists' reports of the characteristics of expertness during cross-examination include the following:

Don't be hesitant or seem vulnerable

Do not be nervous or frightened

Do not get flustered

> Talk to the judge and do not let the (opposing) lawyer rattle you.

For many experts, their credibility is determined substantially by the expertise and expertness they can deliver during the challenges of cross-examination. After all, this chapter's stress upon listed characteristics should not cloud the reality of a complex and dynamic interaction that occurs between lawyers and scientists and judges, and between reliable research evidence and the actual delivery of these resources in a meaningful and convincing way in court.

However, there often are threats to credibility beside the direct attacks of opposing attorneys. To be credible, experts must neutralize certain stereotypes of the dual role of scholarly expert and expert witness. These include: 1) the fact that she thinks and communicates in a specialized and technical jargon, with generalized and theoretical understandings and 2) she is a party witness with a particular side to present and to be loyal to.

If one displays all these characteristics, and does all of these things, will it matter? The truth is probably explained by the lawyer who said:

> It depends on the judge. A judge will accentuate the positive and will accept the testimony of a witness whose philosophy is in line with his own predisposition. If he does not agree with the testimony, there is a good probability that the judge will not be swayed.

The Witness' Relationship with the Judge

What about the judge? Throughout this chapter we have reported judges' views of the characteristics of a good witness. In addition, however, some judges actively interacted with scientists in court, and interacted with lawyers about the evidence and role of scholars. In their interactions in court, these actors demonstrated some of the same principles discussed in the interviews. The examples in this section are taken from transcripts of court testimony in two different cases.[11]

One example comes from a case in which the defense counsel has continually been challenging the plaintiff expert's knowledge of the local area, and the appropriateness of applying his considerable research to the local situation. Prior to this excerpt, the witness has said that intermixing students of different races in school can lead to positive outcomes if other actions are taken as well. The cross-examining attorney tries to simply the issue to mixing, per se, to no avail. When he tries for a simplified "yes"-"no" answer a second time, the judge intervenes.

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[11] Minor changes have been made in the transcripts to try to maintain anonymity of the actors. In no case has any of the meaning been altered.

> DEFENSE COUNSEL: All right. Just to sum up, then, tell me whether or not all of those things apply if this corridor is broken up and the citizens are intermixed with the rest of the community?
>
> WITNESS: The first step is the pure intermixing. Certainly benefits will accrue from that. The real benefit is the challenge of the school district, the administrators, and principals, and teachers, to turn that process of desegregation into the most positive, affirmative, creative situation possible. There is great benefit merely in mixing. There is greater benefit if the School Board and the school district take strong affirmative action. It can become an exemplary school district for the whole United States.
>
> DEFENSE COUNSEL: Doctor, I am not sure, was your answer "yes" or "no" to my question of whether or not these things happen in the event that the corridor is broken up and we achieve a unitary system here? That is your conclusion?
>
> THE COURT: His answer was that it depends on the intent of the School Board and the administrators in breaking it up as to positive action I believe; the children are taught by example, as well as anything else. If the School Board, the way I understand it, does it on its own, positively, affirmatively, with good grace and good intentions, that example will permeate the entire student body. Then the quality of integration, which he is talking about, will be improved more than just shoving bodies around.
>
> WITNESS: That is exactly right. I will add just the mere shoving of bodies around is better than what we are doing.

Sometimes the judge will take the lead in asking witnesses questions. In one case, the judge asked a plaintiff witness a critical question about the relation of segregation to evidence of harm or violation. After several questions by the judge, the plaintiff attorney seized the opportunity to expand on the judge's question, and to ask the witness to use the same research to demonstrate the effectiveness of desegregation as a remedy as well.

> THE COURT: I believe in the Brown case in 1954 that the Supreme Court of the United States, and possibly the lower courts, relied quite heavily on the testimony or the studies or the findings of Dr. Kenneth Clark. Do you recall that to be true?

WITNESS: I believe it is, Your Honor.

THE COURT: Can you review for me briefly what Dr. Kenneth Clark's finding were on that data?

WITNESS: Yes. He had given a group of children in New York City a doll test wherein they had...these were black children... they had the choice between playing with a white doll or a black doll, and they found that black children rather consistently wanted to take the white doll instead of the black doll. The white doll was a more desirable plaything--just little children. Then after they had played, Dr. Clark asked the children if they would draw pictures of the two dolls and rather consistently the white doll was drawn as a larger and more attractive looking thing and the black doll was drawn smaller and less attractive. Dr. Clark, as a social psychologist, concluded from that that the segregated school system had really given the black children a sense that black people were smaller, less desirable looking, and so on, than whites. And I suspect, Your Honor, that this is part of the thing that led the court to use the words "damage them in heart and mind in a way never to be undone."

THE COURT: Any other questions, counsel?

PLAINTIFF COUNSEL: Along the lines of the study you described of Dr. Clark's, are there comparable studies of the effects of integration with school children in New Orleans with children drawing pictures of themselves?

WITNESS: Yes, there was a study conducted in New Orleans. I didn't cite it to the Court because I am embarassed I couldn't remember who did it. It was essentially the same sort of thing as Dr. Clark did, but they were not drawing pictures of a doll. They were drawing pictures of themselves. Also, as I referred to in my direct testimony, the appendices to Racial Isolation in the Public Schools demonstrate quite vividly that black children do perform much better in a desegregated situation, just as far as their ability to respond to a written examination is concerned.

PLAINTIFF COUNSEL: In the New Orleans study was it found that the black children who had been in segregated schools at first would draw pictures of themselves that were minus arms, or legs, or other features?

WITNESS: Yes, it was. The pictures were incomplete or distorted small. There was another part of that study in New Orleans. The children also drew their homes and homes of other children, and the same sort of thing. The same pattern of feelings of inferiority emerged with that, as did with the drawings themselves.

> PLAINTIFF COUNSEL: Following integration was there a change in the type of drawings that the children made of themselves and of their surroundings?
>
> WITNESS: I don't know if the New Orleans study has been replicated. Dr. Clark has replicated his study. He did just about a year and a half ago and has found that the -- not in New York City. He refuses to identify the place. He found that the black children then drew the dolls more equitably and he attributed that to several things. One was the fact of school desegregation. Second was the black power movement with respect to a conscious effort on the part of black Americans to teach their children that they are people, they are worth something, that black is beautiful, and so on.

In response to the judge's question, the witness spoke directly, without hesitation and in detail. He delivered the requisite expertise. Upon subsequent questionning by counsel, the witness admitted his lack of complete expertise, but presented more evidence that went beyond "harm", to "harm ameliorated". Doubtless, various scholars and lawyers may disagree on the meaning of these studies, and of the "integrity" of this presentation. At the same time, several of the principles of good witnessing clearly are demonstrated.

Conclusions

What makes a good witness in any specific situation remains somewhat intangible. Since we are in fact dealing with human beings trying to understand, interact with and perhaps influence one another, maybe that is as it should be. Perhaps the key issues in good witnessing can be summarized in the following comments, the first by an experienced scientist and the second by an experienced judge.

> Testimony is designed to persuade one person, namely the judge, and there's always a question in the minds of the witnesses as to whether or not the judge understands and is listening to what is being said. I attempt to place my responses in different words, or on the next opportunity expand upon an answer which I felt was not communicated well at an earlier point. Periodically, I've simply asked the court for an opportunity to make a statement. At the beginning of the day I might say, I'm not sure that I communicated well when I responded to the last question yesterday, and I'd like to elaborate, is that alright your honor. I didn't do that until I'd been a witness in court several times and developed a little more, shall I say poise, as a witness. Frequently now, the court will turn to me as a witness and ask me to elaborate. I encourage and enjoy that kind of opportunity, because then I know that I'm talking directly to the person who is listening.

I compare the evidence and reread the record and choose the fellow who impressed me the most. I have my clerk take notes and I carefully watch the witnesses while they testify. It's intangible, what I look for. It's partly content, partly sincerity, and partly a good grasp of information.

CHAPTER 12:

STRATEGIES OF CROSS-EXAMINATION

Subsequent to the provision of direct testimony, attorneys have an opportunity to examine those persons who were witnesses for the opposing side. The process of cross-examination helps provide an additional mechanism of accountability in the presentation and examination of expert testimony. Party witnesses now are examined by representatives for the opposing party. This procedure highlights the adversarial nature of the courtroom, and potentially places witnesses in their most adversarial situation and role.

In this chapter we examine scientists' and attorneys' conceptions of the process of cross-examination. In addition, we present scientists' reflections on the degree to which this process exarcerbated their feelings of role conflict in the courtroom. Attorneys' and scientists' views of the partisan nature of cross-examination often leads to a battle for control of evidence and courtroom interaction. Finally, we illustrate this battle by examining five typical strategies of cross, with examples drawn from court transcripts of actual testimony in several cases.

The purposes of cross-examination

Differing views about the purposes of cross-examination are tied undoubtedly to different conceptions of the nature of truth, and to different ways of achieving truth, in the courtroom. Some actors saw the purpose of cross-examination as an effort to get at transcendent truth, truth that existed above party or individual convictions and affiliations. This approach is supported by several legal scholars as an essential element and even responsibility of attorneys' roles. For instance, in objecting to the use of what he saw as weak or inadequate scientific evidence in the early desegregation cases, Cahn indicated that opposing lawyers have a critical duty.

> More important, however, it is a lawyer's duty to conduct through and searching cross-examinations of adversary experts. In this way, he serves more than the interests of his own client. Vigorous cross-examination serves the larger social interest (a) by exposing fallacies in the expert evidence and (b) by deterring experts from making assertions that will not hold water. If the prospect of skilled cross-examination can deter some laymen from committing perjury, it may also deter some experts from passing off wishes as facts (1956:193).

Several scholars we interviewed reported agreement with the view that the basic purpose of cross-examination is to clarify issues and to determine the "truth". As one expert noted:

> The function of the cross-examination is to sharpen what's been said, to make sure the witness says what is in fact true and consistent with reality. It's done to ensure validity, and its terribly important. It is not used to discredit the witness: the attorney who tries that is in trouble.

Despite this view, most scholars saw the purpose of cross-examination as an attempt to "win", as a means of negating one truth in order for another to persevere. They felt it was a partisan attempt by opposing attorneys to undermine their testimony. Moreover, the major tactic they saw being utilized was an attack on their credibility and an attempt to discredit them. Consider these reflections by scientists:

> The opposition's first step is to discredit the so-called expert, to get him to trap and contradict himself.
>
> The purpose of the cross-examination is to destroy the credibility of the witness.
>
> The lawyers are trying to make you look bad and less competent than you are. They will try to make you contradict yourself, and will try to discredit you personally if they cannot discredit your social science data or testimony.

Most attorneys agreed with the partisan view, and saw the purpose of cross-examination as aiding them in their effort to win the case, to argue or demonstrate that their version of reality, or their witnesses' versions, were more accurate. They concurred with scholars' observations that they tried either to destroy the credentials of their opposing witness or to discover weaknesses or holes in their arguments that might destroy their credibility. For instance:

> I guess you would say that a good cross-examiner had to destroy the credibility of a witness.
>
> It was easy to cross-examine him and to effect his credibility because he had a tendency to make a lot of statements that he didn't really have any knowledge about. That they were really opinions that he held without any basis in fact or in articles that he had read or whatever.
>
> My cross-examination of an expert witness is to hold them to the area of their expertise and to prevent their trying to spread the aura of legitimacy from an area which they might be a legitimate and unchallengable expert into an area where they are just somebody else talking.

This partisan view of cross-examination, and indeed the entire courtroom process, creates particular stress for experts, especially for those anticipating attacks by opposing attorneys. In fact, experts expressed far more discomfort and conflict related to cross-examination than to any other aspect of witnessing. The data on role conflict, reported primarily in Chapter 6, are re-examined below to explore this issue. Table 12.1 demonstrates that over half the informants who experienced role conflict noted that all (100%) of their conflict occurred during cross-examination. Moreover, 77% of the informants specified that most of the conflict they experienced occured at this stage of testimony. These results are similar for scholars adhering to legal-adversarial norms as well as those following social science norms. The former reported experiencing all of their incidents of role conflict during cross, while the latter experienced an average of 64 percent of their incidents of conflict-laden normative discrepancies (role conflict) in cross-examination.

Table 12.1

Percent of Experts' Role Conflict Occurring During Cross-Examination

	Occurring During Cross	
% of Role Conflict	N=26	%
Less than 50%	6	23%
50% - 90%	6	23%
100% (all)	14	54%

It appears that a primary root of the stress related to cross-examination stems from the struggle for power and control that occurs between scientists and attorneys.[1] Experts often felt they would not be in control of the lawyer-witness interaction during this phase of testimony; and thus not in control of their own personal reactions, scholarly resources and impact on the court.

> It was not the kind of thing an analyst or researcher is used to. It's easy to get trapped into saying something you don't want to.
>
> As college professors we are used to asking the questions, and you cannot do that in court. You can't fight back.
>
> There is kind of the danger of losing control...of being emotionally coopted.

---

[1] This is not the only issue of course. Another is the drain on one's energies and the sheer length of time witnesses spent on the stand, the constant object of scrutiny and perhaps imminent attack. Indeed, witnesses often spent several hours in cross-examination.

> It required 100% concentration all the time. I found it stressful to face a lengthy and boring set of questions with an expected yes/no response.

The issue of control is critical, especially when both scientists and attorneys tend to view cross-examination as a partisan interaction, as a battle. The following statement by one expert captures this sense:

> It is a little mini-war that the expert-witness plays with the lawyer. And once the lawyer makes you look like an ass, you say, "Boy, next time I get on the witness stand, that lawyer's going to look like an ass."

The control theme is echoed by those scientists who claimed that their cross-examination experience was not stressful. Why not? Because they felt that they had not lost control of the expert-lawyer interaction? Although attempts may have been made to discredit them, to go to war, they felt they won.[2]

> There is no way the lawyer can know enough social science to even come up to your knee in their ability to cross-examine you.
>
> The lawyers are sufficiently unskilled in social science evidence and they can't trap us.
>
> The opposing lawyer approached technical areas where I had expertise.
>
> The first 10 minutes (of cross) were very stressful. But that was because I really didn't know what was coming at me, what kinds of questions were going to be asked....And then I began to realize that I'm the expert on the stand on this issue and that I know more than (the opposing attorney) will ever know.
> So there's no reason for me to be afraid of this guy. Once I realized that, there was no problem. It was a cat and mouse game...He'd ask me questions and I'd sit there and play games with him and toy with him until he asked a question the way I wanted it to be asked, and then I'd load up on it and sit back again.

Part of the reason cross-examination represents a battleground lies in the organizational structure and procedures of the courtroom. The adversarial nature of legal truth, and the adversarial process of courtroom testimony, establish a battleground wherein different versions of truth or reality can be presented and tested against one another. As representatives of their party's interests, attorneys are lead agents in arguing for one version of reality and arguing against another version. When experts enter to present or support one of these versions, they enter the basic battleground. Another reason scholars find cross-examination a stressful battleground, is that many enter it with concern about protecting their own normative stance and sense of certainty about their testimony. Challenges to their testimony that are within the norms of the courtroom may feel to some experts as personal attacks. In that vein, they may fight to defend themselves against intrusion, role confusion, and potential embarrassment.

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[2] As will be demonstrated in the following portions of this chapter, feeling that you won can be a dangerous assumption. Some witnesses seriously under-estimated the skill of opposing counsel, and were taken to the cleaners. As more than one lawyer indicated:

> Really, I really do try to come off as a nice guy in the deposition. I'm just stupid, I don't know anything. You tend to get the experts to really let it out and say things they wouldn't say if you were being really offensive with them. Then they tend to be a bit careless.

What aspects of cross-examination, in particular, undermine experts' control of their own person and their adherence to a preferred normative stance? Part of the answer lies in a comparison of direct and cross examination. During direct examination, there are several opportunities for experts to structure adherence to a preferred normative stance. First, they may carefully select the lawyers for whom they will testify. One criterion they may use is whether a particular attorney will allow them to behave consistently with their preferred normative stance. Second, once they have decided to testify, scholars generally enter a negotiation with their attorney(s) as to the nature of their testimony.[3] In this process, they can identify and withstand attorneys' suggestions and pressures to make statements that may violate their chosen stance. Thus, experts can maximize adherence to a pre-selected normative set in direct-examination by selectively testifying and carefully structuring the nature of their direct testimony. Cross-examination does not offer the same opportunities for structuring normative adherence. Prior to entering the courtroom, experts cannot select the lawyers who will cross-examine them; preparation for cross also is difficult since scholars rarely know exactly what questions will be asked.

For those scholars who choose to adhere to social science norms in court, the adversarial nature of cross may make this stance especially difficult to sustain. One such expert stated that prior to cross, she managed to remain detached and neutral. However, during cross-examination the combative behavior of the opposing attorney made her feel like an advocate, defending a position and side of the case. Another expert stated:

> As the case progressed I became more convinced that our side was right and I'm going to fight it to the last breath I have. But how much of that could have been conditioned by some attorney cross-examining or blasting you in a polite way, saying that for a buck you'll testify to anything, I'm not sure. Being human, I could have been influenced by that sort of thing. Damn it, I'm going to get in there and show you.

---

[3] In Chapter 7 we discussed scholars' choice of normative stance. And in Chapter 10 we described procedures whereby scholars are prepared for testimony, including scholar - lawyer negotiations about these matters.

The combative or challenging behavior of opposing attorneys may make it difficult or dangerous for experts to adhere to legal-adversarial norms as well. Whereas lawyers may desire partisan commitment from their own witnesses, they seek out signs of it in opposing experts, and use such evidence to undermine the expert's credibility. An expert may be labelled as "biased", a "hired gun" for one of the parties or a "carpet-bagger." As one expert reported:

> That made me almost angrier than anything when he implied that the way I was reporting the data might have had something to do with hiding the facts. Especially since I felt that I had been very much up front in the beginning, that the facts were the facts regardless of how I felt.

Such labels can undermine the credibility of any witness. Legal-adversarial experts are as interested in appearing credible as social science experts, for if they lose their credibility, they can no longer help their side win its case. Therefore, successful labeling of adversarial or social science experts may challenge their continued ability to sustain their preferred normative stances.

If this discussion highlights some of the impacts of cross-examination on expert witnesses, how does the process work? What does cross-examination consist of, and how is it done? in the next section of this chapter we explore and illustrate some common strategies of cross-examination.

Strategies of cross-examination

Having laid the framework of the cross-examination situation, let us examine some specific approaches attorneys used in the general attempt to discredit opposing witnesses. In this section we illustrate 5 strategies used by attorneys in typical cross-examination proceedings, including:[4]

Challenges to the witness' academic credibility
Challenges to the witness' knowledge of local issues
Implications of special interest or personal bias
Searches for admissions of legitimacy of opposing views
Exposures of contradictions or errors in testimony

In addition to illustrating these general approaches, we provide several examples of the procedure whereby attorneys "lay a trap" for a witness, and try to throw him or her off stride in order to spring a sudden challenge. All the examples provided here are taken from a review of over 2500 pages of transcripts of courtroom testomony offered in the school desegregation cases.[5]

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[4] These strategies, as reported by attorneys and depicted in the court transcripts, attack various bases of witnesses' expertise and expertness, as discussed in Chapter 11.

Challenges to witnesses' academic credibility.

Several attorneys indicated it was fruitless to challenge directly a scholar's academic credentials. After all, if a person is admited as an expert, has the requisite degrees and publications, etc., that might not be very productive. However, academic standing and credentials can be attacked in other ways. As one attorney indicated in an interview:

> I don't challenge their credentials. I don't need to do that ....You just want to make clear what it is that forms the basis of their testimony. It's important for the judge to know whether this person is brought forward as an expert knows what the hell he's talking about.

Of course the attorney who attempts to discredit a witness personally must be careful. In the early desegregation trials, cross-examination of plaintiff witnesses often was particularly disparaging, sometimes to the discredit and tactical disadvantage of the opposing counsel. As Cahn indicates in his review of Isadore Chein's testimony and cross-examination:

> In the Virginia trial, the defense appeared particularly inept. Far from caring to concentrate on the doll test and its scientific validity, the lawyer for the defendants was preoccupied with other lines of cross-examination. He had a different set of values to display. Why concern himself with dissecting the experts' logic and the correctness of their inferences? Instead questions were asked which would convey disparaging insinuations about a professor's parents, his ancestral religion, the source of his surname, the pigmentation of his skin, or the place of his birth...As any healthy-minded person reads the Virginia trial record, it is impossible not to contrast the altruism and sober dignity of the scientists with the behavior of the defendants' counsel, who by his manner of espousing the old order, exposed its cruelty and bigotry (1955:165).

It is rare to discover such crass cross-examination in this day and age.[6] But this history is on record. And its existence, as well as critiques like

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[5] These excerpts from courtroom testimony have been edited to try to preserve actors' anonymity, but we have tried not to alter the meaning of any particular testimony. Although these excerpts are, we think, illustrative, we caution the reader to remember that as in all interaction settings, abstracted bits of dialogue and behavior can never convey the full meaning of underlying events.

[6] Of course, there still are ad hominem attacks on witnesses, but they generally are less violent and less common.

Cahn's, helped establish some limits to the direct attacks on scientists' personal credibility in these cases.

One way attorneys may attempt to challenge a witness' credentials directly is to raise questions about their experience and knowledge of the field. For instance, in one case an attoreny challenged one educational scientist's limited experience as a school superintendent.

COUNSEL:	You yourself have not been the superintendent of any large city—
WITNESS:	That is correct.
COUNSEL:	According to the newspaper you were the superintendent at some district in the state at some time.
WITNESS:	They were two separate disticts.
COUNSEL:	How big a district was the first?
WITNESS:	Oh, small. Enrollment at the time was under a thousand, but I can't remember the exact number.
COUNSEL:	Any blacks?
WITNESS:	No.
COUNSEL:	How large was the other one?
WITNESS:	Somewhat larger. I am trying to remember. If you give me an honest man's leeway, I would say a thousand, give or take some.
COUNSEL:	And were there any blacks there?
WITNESS:	No.
COUNSEL:	Is that the extent of your experience as an administrative head of any school district?
WITNESS:	Yes.

Other challenges to a witness' credentials may include examination of prior testimony or scholarship, particularly if the scholar has testified in other cases. In the following excerpt, the attorney has read to the court passages from a social scientist's own early work, in an attempt to show his current testimony is different:

COUNSEL:	My point is that you now repudiate it. You're now saying you repudiate —
WITNESS:	I would now soften what I said here when I said, "virtually unknown empirically", because there have been empirical studies on the question that tend to show that, as is the case for whites, black housing sites tend to follow black job opportunities.

Several attorneys indicated that it was easier for them to conduct a cross-examination of witnesses who had testified many times before. After all, their statements were on the record; it was easier to predict what they would say, to prepare to challenge it, and perhaps even to find an embarassing admission or error in pages of prior testimony.

> He had never testified before, which you can understand is a benefit in that he didn't have a million pages of cross-examination to pull out the mistakes that he had made before.

When an expert had not testified before or did not have a personal track record, different challenges were necessary.

In addition to challenges focussing on the witness' own experience and research, attacks of a more indirect sort were made on the source material a scholar cited. Here the attorney attempts to challenge the witness by implying that sources not appearing in a refereed journal may not be quite acceptable, legitimate or fully scientific.

COUNSEL: Was that published in a refereed journal?

WITNESS: It was a special report by the Department of Geography

COUNSEL: Was it published in a referee journal?

WITNESS: No.

Later, the witness turns the tables, and raises the same issue regarding one of the attorney's sources:

WITNESS: Has this article been published?

COUNSEL: Yes, I believe so.

WITNESS: Where was it published?

COUNSEL: It was published by the Survey Research Center of the Institute for Social Research...I don't know if it's been published in a refereed journal. It's a hard-cover book I have been advised.

The game continues: now the attorney "reduces" the witness' reference to a much less credible source, a graduate student's doctoral dissertation!

COUNSEL: Was it a book?

WITNESS: It's a dissertation.

COUNSEL: Was it published by a commercial or academic publisher?

WITNESS: No.

COUNSEL: So this is what we call a student doctoral dissertation?

WITNESS: Yes.

The works of others often comes up for attention: in another case, the attorney queried a witness about his knowledge of a particular work by Professors Lebow and Wolf, a study that disagreed with his testimony:

> COUNSEL: Are there any sociologists whose studies have contributed to your knowledge in this subject?
>
> WITNESS: Yes.
>
> COUNSEL: Do they include Charles Lebow and Eleanor Wolf in an article that they wrote in the Prager Special Studies in U.S. Economic and Special Development in 1969?
>
> WITNESS: I do not know.

Not satisfied with this admission (or evasion), counsel pressed on, drawn perhaps by the possibility that the witness indeed might not know the field:

> COUNSEL: Well then you have not read their work...on the impact of real estate solicitation in respect of discrimination in the housing market? Is that correct?
>
> WITNESS: I do not know whether that is correct. I do not presently recall that study.
>
> COUNSEL: Well do you recall any study by any sociologist to support the conclusion that you have expressed to the alleged steering effects of real estate brokers in the local housing market or the national market, whichever you prefer?
>
> WITNESS: Now that you asked the question, I will try to give an answer to it. Gunnar Myrdal while officially an economist, is a reputable social scientist and I would count the work of Adelle Lipman as one. Rose Helper wrote a dissertation at the University of Chicago and published it as a book on discrimination in the practice of real estate. I am trying to recall a book that I cited in my own publications.

At this point the witness continued to answer the question for several minutes, with page on page of references.

Attorneys can also challenge a witness' credibility in terms of their track record in studying the precise issue to which they are testifying. Granting the witness general expertise in the area of residential segregation, the attorney below closed in on a scholar's publication record regarding the role of schools in this process (known as the "Problem of Reciprocal Effect ").

> COUNSEL: In fact, Doctor, everything that I have read of yours, including your articles....at no place mentions school de jure segregation as a cause of racially segregated neighborhoods, is that a fair statement?

WITNESS: I don't know whether there is some reference to it in the materials of the kind you mentioned, about, but I have not studied that aspect specifically.

COUNSEL: You came here to testify about it, though?

WITNESS: Certainly.

COUNSEL: My point is, can you refer the Court at any place in your various publications where you attribute segregated racial patterns to education and assignment of pupils by an educational system. You cannot, can you, Doctor?

WITNESS: No, I can't.

COUNSEL: And yet you have written literally thousands of pages on the question of residential segregation in course of your career?

Challenges to Witnesses' Knowledge of Local Issues.

A second major strategy used by attorneys in cross-examination is a challenge to the national scholar's general data with regard to its relevance, applicability and validity in the local arena. As noted by one attorney, some scholars are east to cross examine because they lack time on-site, experience in the specific locale, or even knowledge about the case and school situation at hand.

> He on the other hand, was an easy cross because he had no familiarity with the city. He had no familiarity with voluntary programs. He had no familiarity with mandatory programs. He was basically laying out a line that would have destroyed public education. So he just came here and pontificated and it wasn't too hard to deflate that.

One example of the use of this strategy follows:

COUNSEL: Can you tell us where the initial palcement of a school in this city has influenced the initial character of the neighborhood?

WITNESS: No, I can't.

COUNSEL: Since you can't tell us one, then you are not telling the Court that the initial location of schools in this city has influenced the racial character of the neighborhoods?

WITNESS: No. I am not adducing any specific examples about this city, and in particular, I would be uninformed about the initial placement, because most of my studies have dealt with a period when the city was largely built up — had more to do with relocation and redesignation of the character of schools.

COUNSEL: Doctor, I inquired of that because you were tendered by your attorney as an expert in the field of racial residential urban segregation, especially in this city, and that is what you purport -- you do purport that to be your field of expertise.

WITNESS: Yes.

A similar dynamic is reflected in cross-examination following a witness' testimony that residental location (and segregation) is a function of access to jobs (and not necessarily of school placement).

COUNSEL: Now, based upon your knowledge of this city, where would that put the concentration of the black population, do you know?

WITNESS: No, I honestly don't think that I know that much about this city, sir.

COUNSEL: You don't know?

WITNESS: No.

COUNSEL: You are testifying about this city, but you are saying that you don't know where the jobs are concentrated?

WITNESS: In terms of black jobs and their concentration?

COUNSEL: Or the white jobs?

WITNESS: Pardon me.

COUNSEL: You don't know where the jobs are period?

WITNESS: Well, I know a few things about the city, but really I wouldn't present myself as knowing that much about it.

Another example of this general approach comes from cross-examination in which the witness clearly anticipates the line of attack, and attempts to distinguish his observations ("refamiliarizing myself") from his investigations (scholarly "study"):

COUNSEL: Your study of this school system, if I have got it correctly -- first, your study of the plan is limited to your driving tour of the schools, right, on two separate occasions?

WITNESS: My study of what?

COUNSEL: Of the plan.

WITNESS: Of the school plan, yes.

COUNSEL: And you didn't go in the schools?

WITNESS: No sir.

WITNESS: No on that tour. I have personal acquaintance among many teachers and I must say I have conversed with some of them.

COUNSEL: But your investigation did not include conferences for that purpose with any teachers or principals or administrators?

WITNESS: You are speaking now of my tour?

COUNSEL: Yes

WITNESS: Yes, and I think you dignify it to call it an investigation. I was refamiliarizing myself with the schools in this system.

COUNSEL: And you haven't made any study of the type of programs which are being advanced, taught, in each of the various schools?

WITNESS: No sir.

COUNSEL: Nor of the particular training which particular teachers have received for particular programs in the particular school?

WITNESS: No, sir.

A particularly interesting example of this form of challenge, and the Court's response to it, is provided below. It is taken from testimony and cross-examination in which the witness' studies of minority education already have been referred to several times. After testifying to these studies, the witness indicated that he spent a little time observing and talking with educators in the local school system. Moreover, the witness has just characterized one school as a "minority" school, and one of the best he has seen; he also has characterized another school as a "white" school, and one of the best he has seen. Counsel challenges the witness on his limited observations, and addresses the Court with a serious concern:

COUNSEL: I think we are entitled to show that it takes time to accurately evaluate a school and that unless you have a preconceived notion as to what you are going to find...

THE COURT: He says it is based on what he saw here, but what he saw here supports his factual basis and former investigation of students in all the region, and his visits here to the schools, for a very short time, only support what he has observed in years of study.

COUNSEL: What we want to demonstrate is that it is recognized that you can't make any valid conclusion at all about how a particular school or class is conducted without considerably more visits that the witness has made.

> THE COURT: He has not testified how the school is conducted or how it was evaluated. He just says that his short visit here substantiates what his previous findings on a study of "minority" schools, that these schools which were either minority or white, fell in the same pattern and substantiated or verified his previous conclusions which he made from studies.

Now the Judge elaborates his point to the examining attorney:

> THE COURT: That is where you are misconstruing the testimony. He didn't testify he reached the conclusion from looking at the school for an hour and a half. He said his studies teach him certain patterns that exist in segregated schools. He said the short time in an hour and a half of what he saw substantiated the studies he made which shows when you segregate children in that percentage of eight-five minority, certain patterns are going to exist.

While this dialogue is occurring between attorney and Judge, the witness sits back and waits. After all, the judge is responding to the challenge to the witness' expertise.

In the same testimony a similar dynamic occurs later, although on a different topic. The witness has just testified to the problems of teacher prejudice against minority youth, and to the potential impact of such attitudes on student performance.

> COUNSEL: Did you talk to any teachers? You said you did not talk to any teachers in this city to see if this is a prevalent attitude?
>
> WITNESS: I said I talked fifteen minutes to one teacher. I also said I drew no conclusion from that. I said that is a general characteristic across the nation.
>
> THE COURT: Do you think you can ask the teacher or superintendent, or the School Board Member, or a Doctor of Education, or a housewife, or a Federal Court Judge, if they are prejudiced and they will say they are?
>
> WITNESS: It is impossible. There is no instrument to measure that.
>
> COUNSEL: I presume a man of your qualifications who has been making surveys can make questions of a particular individual to get some indication about how they feel?
>
> WITNESS: Honestly, I think you can, and this is, of course, what I did. And I automatically got the stereotype. I am not talking here and now about throughout the nation, but I will stand on it that we have tapped the real feelings so that I consider the more important thing

> is not the attitude and not the perspective, but the behavior. The behavior is observable, it is recordable. If I were to study this city it would take me a year, probably, and what I would do is establish check sheets on the behavior of teachers: how many times does X teacher or teachers as an aggregate call on minority children as related to such and such, how much reinforcement, how much reward, what kind of reward? I would use some kind of interaction scale. I think it is a dead issue to look toward prejudice. What I said is teachers in minority schools tend to be pessimistic about the ability of their children to learn. I refer you to "Dark Ghetto" by Dr. Kenneth Clark to support what I say about the black population, and so forth. He has not studied this city either.

Buoyed no doubt by the judge's intervention and apparent sympathy (with his expertise, if not necessarily his stance on the issues), the witness subtly attacks back in his last comment. Clark, whose testimony formed the scientific basis for Brown, et.al., has not studied this city either!

Implications of special interest or personal bias.

A third strategy of cross-examination attorneys employ is to suggest, or gain admission, that the scientist somehow has been compromised by his or her personal interests or biases in the case. The special interests at stake may involve monetary gain, publicity seeking, allegiance to a particular party or strong ideological commitment. In Chapter 11, we reported several comments from judges indicating their sensitivity and alertness to this factor. Attorneys generally are rather cautious about how they employ this strategy. A direct approach might have them labelling all experts as "hired guns", "whores", or "party shils". Rather, a more subtle and indirect series of inquiries and implications usually are used.

Innuendoes and direct suggestions that financial gain, perhaps ill-gotten at that, may be at stake, can be seen in this cross-examination excerpt:

COUNSEL: Is there a rule in your University on consulting time?

WITNESS: There is no rule in the University at the present time...

COUNSEL: Your fees go directly to you and not to the University, I take it?

WITNESS: That's true.

COUNSEL: Have you been on the University payroll full time during the period when you have spent twenty-five working days on this case?

WITNESS: I have.

This kind of questionning is not unique. Frequently, the questions to plaintiff and defense witnesses are even more specific, probing how much experts were paid, how many hours or days they worked on the case, etc.

A somewhat different line of attack focuses on the nature of the party affiliation of the witness, and its potential impact on his/her interests, and therefore testimony. Consider the following questions:

COUNSEL: And would this be a fair summary of the circumstances: that your colleague advised you that he was contacted by counsel in this case and that he wanted to put together, let's say a package of testimony, with several... of you putting together expert testimony, designed to show the governmental discrimination was not a significant cause of the condition of residential racial segregation existing here?

WITNESS: I was never asked to do a study that was designed to show anything. He approached me, asked me if I would be willing to do a study of the...black and white population of the city and what implications that might have for explaining desegregation.

COUNSEL: But he made clear at the beginning that this would be as an expert witness on behalf of the school board.

WITNESS: Yes.

COUNSEL: And that was in the school board's interest to show that governmental discrimination was not a substantial cause of this?

WITNESS: I don't remember whether he said that or not.

COUNSEL: When he talked to you, as your testimony developed, as your research developed, is it fair to say that you knew what the others were doing, and they knew what you were doing?

WITNESS: I had less knowledge of what the others were doing, but generally my colleague and I discussed our studies as they went along.

In his response the witness makes it clear he was not "out to prove" anything, but was conducting a study "to discover". The attorney did not make much further use of the alleged combination of witnesses.[7]

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[7] Although on other occasions it has been suggested that both plaintiff and defense attorneys have these standard "teams", "stable of witnesses", or "dog and pony shows". See discussion of this issue in Chapters 3 and 9.

A somewhat similar approach was used in another cross-examination:

> COUNSEL: I understand that you have testified in many cases involving the same examination of effects of residential movements in desegregation cases.
>
> WITNESS: I have testified in many cases. The examination has varied from one to the other.
>
> [...]
>
> COUNSEL: In any of these cases, have you testified on behalf of a board of education or other defendant wherein plaintiffs are seeking a desegregation order of some kind or another?
>
> WITNESS: I cannot give a direct answer to that, because I do not follow that closely the legal status of who is challenging whom at the particular stage in which I appear.
> As I mentioned in the deposition, I have testified for a Board of Education when it was seeking the desegregation remedy that I believe was at stake at that particular stage of the trial.

The full meaning of this witness' answer remains somewhat unclear; perhaps deliberately. It is unlikely that the witness really does not follow closely "the legal status of who is challenging whom", but he is clearly under no obligation to volunteer such information. Moreover, his insertion of the example where he did testify for the school board (which was the original defendant in a city suit, and became the plaintiff in a metropolitan suit), indicates his sophisticated understanding of both "the legal status" issue and the attorney's intent in asking the question. This line of questionning was not followed further in cross.

A variant of inquiry into witnesses' interests is the attempt to discover, or suggest, that the witness has personal views, for or against desegregation, that might impede his/her ability to act as an apparently neutral expert witness. As one attorney suggested of a witness:

> On a broad sort of basis he had just been committed to segregation. He has no real commitment to any sort of desegregation, he was really a racist and I wanted to go through his writings and his previous testimony to demonstrate that.

One example of this attempt is reflected in the following cross-examination:

COUNSEL: Do you have any personal views on the desirability of school integration.

WITNESS: I think the way to achieve school integration is through housing.

Not having received a direct (yes/no) answer to his second question, the attorney returned to it later in two different ways. First, he asked the witness about his views of his own city:

COUNSEL: With regard to that type of busing, have you made a public position.

WITNESS: What type of busing?

COUNSEL: For school desegregation.

WITNESS: Have I made a public position on that?

COUNSEL: Yes.

WITNESS: No, I have not.

Apparently satisfied that the witness was not publicly and politically active (as other than a scholar) on desegregation issues, the attorney returned to the original question a second time.

COUNSEL: At the outset of your direct examination, you were asked I believe, whether or not you thought school integration should be accomplished through desegregation of the schools I believe-- and I'm not sure I can reconstruct it. I recall you saying something about you thought school desegregation would best occur through the desegregation of housing is that correct?

WITNESS: I think that's a reasonable summary. The question was about — I think the first question was about —

COUNSEL: Are you in favor of school desegregation?

WITNESS: No, I think it was -- the first question was about segregation in general. Then there was another question about schools. I think the substance of what you're saying is corrенct, that I thought that the way to accomplish school desegregation was through some form of housing desegregation, that housing was the key.

Is the witness in favor of school desegregation? It is not yet clear, at least not from this testimony. The issue is apparently not pursued further, but if it had been clear that the witness was opposed to school desegregation, he would be opposed to Consitutional guarantees, and, in the eyes of most courts, incredible as a scientist in terms of the precedents of Brown et al. For the witness to be in favor of desegregation, but opposed to one or another way to accomplishing it, is quite another matter, and a legitimate one as far as the courts are concerned.

Another approach to the same agenda involves probing witnesses to discover whether they are ever prepared to alter their standard analysis because of the dynamics of a particular situation. Needless to say, if it can be suggested that a scholar always says the same thing, all the time, he is open to being challenged as biased in his interpretations, rather than reading the data carefully in each case. Of course, the scholar who is studying and analyzing general phenomena will probably find them working in most school and community situations. Thus, this challenge may be a slightly different version of the national-local relevance challenge noted earlier.

> COUNSEL: Is it fair to say that except with respect to systems that were placed under some formal court order, you have never found a situation in which actions of school officials have not affected residential decision making?
>
> WITNESS: Let me try and rephrase that - There are two negatives and a qualifying phrase and it is hard to figure out. Could I ask you to rephrase that?
>
> COUNSEL: Certainly. Is it fair to say you have never reached a judgment that actions of school officials have not contributed to racial separation in any community where you have made an examination?
>
> WITNESS: Many cases I have not been asked that kind of question, so I have not reached that conclusion in all cases.
>
> COUNSEL: But whether or not reached in all cases, have you ever reached a conclusion that actions of school officials have been racially neutral and have in fact affected residential decision making?
>
> WITNESS: I do not recall so at the moment.

Search for admisions of legitimacy of opposing views.

A fourth major strategy attorneys use in cross-examination of expert witnesses is to try to get them to admit that other scholars might reasonably come to a different conclusion about a situation or data set. If such admission can be gained, then it is truly "one person's opinion versus another", rather than one person's views representing the bulk of scientific evidence. Attorneys know scientists have a tendency to such "fairness", and usually want their own witnesses to stick to their guns. As one attorney commented:

When you are on cross-examination, the other side is going to try to discredit you. So, how a person conducts himself on past cross-examination in one of these cases would be one of the factors we would look at in determining who we would want to call as an expert. Somebody that isn't easily shaken from his opinion, who doesn't hedge and backtrack from what he said on direct because of a few pointed questions by the opposing counsel. So you want somebody who is firm on his opinions and can back them up because they are going to attack you. I think they have got to suggest, well, isn't it possible that other factors are the real reason why that happens and not the factors you listed? And he has got to be able to say no and this is why: because I have studied those other factors and this is why those factors are not the reason.

Efforts to find admissions of reasonable doubt frequently require the attorney to use other witnesses' testimony or studies as a spring board. In the first example, the witness first resists but then admits legitimate opposition.

COUNSEL: So that it's fair to say that social scientists in good faith differ considerably as to what is the best way to study data.

WITNESS: I think there is some debate about how to handle data. I think more debate comes on what the structure of the models are.

COUNSEL: This is what I think I was getting at. Could different persons, using the same data — could they be using different models and thus come up with different predictions?

WITNESS: Yes. I believe they would be using the wrong models.

COUNSEL: Right, but one could disagree on that?

WITNESS: Yes.

A similar tack on cross-examination also gets the following witness to admit to scholarly disagreement. However, when provided the opportunity by counsel, the witness indicates his continuing disagreement with alternative studies.

COUNSEL: Isn't there a respectable body of sociological opinion that holds, no more than whites do, Negroes do not want to be a minority in their own neighborhood? They prefer, other things being equal, to live in area where they are a majority group, at least a neighborhood where there is no clear majority group?

WITNESS: No. I would disagree with that. There are two components. One is: are there sociologists that say that: and secondly, is there evidence that demonstrates that?

COUNSEL: My question was somewhat different from either of those points. My question was whether there was a body of sociological opinion which holds to that point of view.

WITNESS: Yes, there is a body of sociological opinion, opinion by sociologists to that effect.

COUNSEL: Isn't there also not a body of opinion that holds certain white ethnics will self segregate voluntarily and without impact of restraints?

WITNESS: Yes, there is some body of opinion to that effect.

COUNSEL: Do you hold a view different from the body of opinion?

WITNESS: I believe that the studies that I have seen on that have certain weaknesses. So that first, I am not sure that the kinds of voluntary self-segregation that are being talked about, for instance, the Polish community or Italian community or the Jewish community — I am not sure first that those are free of taint of historical discrimination to help determine the factors in the first place, and in some instances still continues to operate.

Further cross-examination in this case illuminates another part of this general strategy of cross-examination. Earlier, the witness provided a long list of scholars whose views coincided with his own. Now the defense attorney seeks to have the witness admit (present?) a list of those who oppose his view. Perhaps the issue here is to show there is a reasonable number of scholars who disagree. Perhaps, as the lead questions suggest, the point is to demonstrate the witness' bias in not knowing or reading scholars who disagree with him (if this is indeed the intent, note how gently it is raised).

COUNSEL: I do not mean this to be an unfair question at all: Do you read works that disagree with your own views as to sociological methodology or effects?

WITNESS: Yes.

COUNSEL: Now could you cite us some sociologists who would disagree with the opinions that you have expressed here today as to the impact of alleged steering by governmental agencies in respect to urban renewal programs or real estate brokers in respect of sales solicitation?

WITNESS: I am familiar with the fact that Professor X has differed from some aspects of the assessment of ethnic choice; but that is not something that I dealt with in my testimony. It does not have to do with the facts of racial steering...I do not have at my fingertips any bibliography to suggest people who disagree.

"Setting a trap" for exposures of contradictions or errors in testimony.

A final strategy attorneys use to challenge or impugn the credibility of opposing witnesses is to discover contradictions or errors in their testimony. In the extreme case, the following rationale and plan for "trapping" a witness may be used:

> He is very dishonest with his numbers. And you could show that, you could do that in this case where he manipulated numbers, manipulated figures to get certain results that were pre-ordained, given his biases and his previous finding. And you could demonstrate that in other cases in order to get certain conclusions he manipulated numbers. One way in here he would take the same numbers and do something else with them so it wasn't hard to show those contradictions.

Since experts are themselves adept and alert, attorneys seldom can extract damaging testimony or admissions directly; a variety of subtle devices are more often used. Sometimes an attorney who is about to trap a witness has thought his approach out carefully well ahead of time, and has set up an intricate argument. At other times, the attorney just falls into it: one question leads to another and sooner or later the attorney discovers how he might be able to make an effective challenge. In this section we present several extended examples of how these traps are developed. The reader, who now knows that traps are being set, can imagine how each vignette will end before the end occurs.

In this first example, the cross-examining attorney spends a good deal of time asking the witness what materials he has read, how much time he spent on them, etc.

> WITNESS: There were two huge boxes. I was a little dismayed when I sat down with all these documents. I did attempt to look at all of them but it was quite -- its quite obvious that I could not read what appeared to me to be about six thousand pages of housing documents. I looked at most of them and picked and selected, trying to get a feel for the housing documents. I looked at what other material was available and yesterday I spent some time with the bin of maps.
>
> COUNSEL: How much time?
>
> WITNESS: With the maps? I looked at all of the maps because I'm interested in maps.
>
> COUNSEL: How many maps and how much time?

The witness indicated he worked hard and read a lot of material -- a "good witness". This line of question and response continues. It is not yet clear what the attorney's intent is: does he know where he's going or is he "fishing" for a vulnerability, an opening?

COUNSEL: Can you tell me what depositions you read?

WITNESS: If you would like me to counsult my notes, I can. Just off the top of my head...I would have to look up the names because the names were all unfamiliar to me. Would you like me to do that?

COUNSEL: Yes.

[...]

WITNESS: It was a substantial document. It was perhaps — I'll give it by thickness. It was perhaps a half inch or three-quarters of an inch thick.

COUNSEL: Did you read a quarter of an inch or a half inch or all of the inches?

WITNESS: I thumbed through it. I don't think it's ever necessary to read every word in the volume to get an idea of what's in it. If we in academics had to do that, you would never get through all the stuff there is to read.

COUNSEL: What other documents?

WITNESS: As I said to you, I read and selected in that listing of housing documents, given the time constraints that I had, and I found many of them interesting and some of them I made a few notes on that I could add to my lectures. There were some interesting points made.

COUNSEL: What did you find interesting?

WITNESS: I found an interesting discussion of the public housing policies.

COUNSEL: Which aspect of the public housing, the fact that it was segregated?

WITNESS: No. I was more interested in the procedures for developing that and the way in which it had been effected in this city.

Suddenly, the questionning becomes more direct: a specific question is asked about a specific housing unit.

COUNSEL: Do you recall what it was you read about Perry Homes?

WITNESS: I think what I was interested in was that in some of the documents they indicated that the expansion — the growth of the black residential area to the west was affected by the location of Perry Homes, which was built by a black developer on vacant land and so influenced the growth in that direction.

COUNSEL: Was that private housing?

WITNESS: I believe Perry Homes was public housing but I would want to recheck that. I thought initially that Perry Homes was a private development and I was corrected in a conversation about that so I would want to go back and check the document to be absolutely precise.

COUNSEL: Do you know how many units of housing are involved in Perry Homes?

WITNESS: No, I do not.

COUNSEL: Do you know its location -- I'm sorry strike that. Do you know the time that it opened, the date that it opened?

WITNESS: The exact date?

COUNSEL: The approximate date.

WITNESS: In the twenties some time I believe.

THE COURT: When?

WITNESS: I thought it was in the twenties some time.

COUNSEL: Do you know the surrounding area by race or by zoning, what was around Perry Home site at the time that it opened?

WITNESS: I have not made a study of that specifically.

COUNSEL: Do you know if it was adjacent, immediate adjacent to the black expansion area?

WITNESS: I said I didn't make a specific study of that.

[...]

COUNSEL: For your information, the Perry Homes housing project is the largest housing project in the metropolitan area. It was built and opened in 1952, all black.

WITNESS: That's an interesting piece of misinformation then in that document that I copied out. I have a note here that there's a comment about Perry Homes influencing the expansion west in the twenties and that is one of the housing documents. I would certainly like to look at that but I could be mistaken. As I said to you, I tried to look at as much of the housing information as I could, given the time, but I was writing rapidly and reading rapidly and errors do occur.

The trap was spring: the witness did not remeber key pieces of information about the "largest housing project in the metropolitan area", and a segregated project at that. The witness tried to double back by suggesting there was "misinformation" in the record, talking about the work-load, and admitting he might have been mistaken.

Another example of an attempted trap for error or contradiction comes from the following cross-examination of an expert whose direct testimony linked housing and school segregation to governemtnal actions.

> COUNSEL: Is it true that it is your opinion that racial separation in housing occurs regardless of the character of local laws and policies, and regardless of the extent of other forms of segregation and administration?
>
> WITNESS: Would you check the last word? Yes, that is a sentence I wrote many years ago to which I still agree.

The witness has recognized that the attorney was reading to him from his own published works. Had he denied the comment, he would have been contradicting his own words. Now the attorney will press him to admit the conclusion that this argument means that local systems cannot be held responsible for segregation, and the witness attempts to clarify (or extend) his meaning without letting local officials off the hook:

> COUNSEL: So that the phenomena of increasing separation or continuance of racial separation in housing can in fact occur regardless of local laws and policies of governmental agencies; is that not correct?
>
> WITNESS: It can indeed occur. This is not to say it has occurred, but it can indeed occur despite the kinds of local efforts that have been made as of the earlier period. This quotation comes from a work written several years ago.
> The point that was being made was that every city in the United States had a high degree of racial residential segregation. There had been some feeling during that period of time, when civil rights legislation was just beginning; New York City has led the way with a fair housing law in 1958 and a few other cities had adoped such ordinances.
> My earlier conclusion was there was no evidence that those had had a major impact and hence the residential segregation continues despite local laws which had not been in effect.

> It did not say residential segregation was not affected by federal laws, which is one of the forces that affect cities throughout the country.

In one instance, a witness openly discussed the role of de jure segregation in Northern school systems. Given the legal history of de jure - de facto distinctions in Southern and Northern school systems, the attorney sensed he had caught the witness in a critical error or a legal faux pas.

COUNSEL: Oh, you have found a Northern city that does have a de jure segregated school system?

WITNESS: By my understanding they all have it.

COUNSEL: All Northern cities have a de jure segregated school system?

WITNESS: By my understanding, yes.

COUNSEL: If it should be determined that all Northern cities do not have de jure segregated school systems, then what would your conclusions be?

WITNESS: Well, you are referring to a determination, using the particular determination within a court of law. I am referring to a scholarly definition with respect to the kinds of impact these laws and administrative uses, I have testified, affects residential patterns.
I would not change my statement on the basis of what those Court determinations happen to be. This is referring to a legal rather than scholarly definition of the term.

The witness' response works in this case. The cross-examining attorney persisted. The witness' own attorney intervened, and the Judge finally halted the interaction by indicating that the witness did carefully distinguish between legal and sociological definitions, and that he has been clear enough.

A final example of attorneys' attempts to trap or catch a witness in a contradictio came later in the same case:

COUNSEL: I understood you to say that in 1940 we had more residential desegregation than we do today, is that correct?

WITNESS: The degree of segregation was less in 1940 than it is today.

COUNSEL: Degree then. Excuse me. I am sorry I did not insert that term. Now, the degree of residential integration being greater in 1940, then it is hard to say that the de jure school system had anything to do with residential segregation if you now find that the degree of residential segregation is greater than in 1940? Would that not seem to follow?

WITNESS: No, I don't think it does.

COUNSEL: Why? I said why, Doctor?

WITNESS: Well under a complete separate, racially separate school system then it doesn't matter to a white whether he lives near blacks or whites in terms of the character of the school his children will attend. Under a system in which, by his residential choice, he can determine whether the school will be predominantly black or white, then it is an even more important factor. In other words, schooling is more important today in determining where people would live and their ability to exercise their preferences for segregated schooling than in 1940.

COUNSEL: Thus you say, or might I conclude that desegregated schooling is a prime cause of increased segregation? Would that not follow Doctor?

If it does follow we have "reciprocal effect" in reverse, and a very damaging admission for the pro-desegregation plaintiff. How did the witness respond?

WITNESS: No. It would not follow, in that it is my understanding that there is not a situation of desegregated schooling to the point at which the location, the residential location of the family, has no impact on the racial composition of the school which the children attend,

COUNSEL: Would you read that answer please?

(Answer read)

Doctor, I don't understand that answer.

WITNESS: Don't those three negatives manage to make it come out just right? My point was simply --

Is this simply unclear? Or did the attorney not believe it? Did the witness? He was asked for clarification:

COUNSEL: Maybe if you read the question back, and then you may reanswer it if you would. Read the question, and then reanswer it Doctor.

(Question read)

WITNESS: I would argue that there is not totally desegregated schooling, and that some degree of desegregation of schooling short of total desegregation does not have that impact. In other words, to the extent that whites can choose the racial composition of their

> children's school by moving, to that extent the racial composition of schools will become a more important factor in residential location, to the extent that there is complete desegregation -- to that extent it can no longer be an important factor within the school area that is covered by this total desegregation, because at that point the choice of neighborhood will have nothing to do with racial composition of the schooling of the white families' children.

Maybe and maybe not: but if the criteria for testing this possibility is "total desegregation", obviously no district is in a position to continue the discussion. The cross-examining attorney tries to persevere, but plaintiff counsel intervenes, and this trap slowly opens.

Experts' Strategies in Cross-Examination[8]

These excerpts of cross-examination should do more than illuminate various strategies and challenges made by opposing attorneys. They also should provide some indication of the reasons scientists experienced stress and potential conflict in the courtroom. However, they also indicate ways in which scientists tried to cope with challenges and, in many cases, fought back. After all, scientists engaged in the struggle for power and control during courtroom testimony were not passive and dependent objects. They, too, developed procedures for deflecting or counterattacking attorneys' challenges. Their procedures were reactive, for the most part, because initiation of challenges lay in the attorneys' hands; but experts did have choices about how to respond.

One strategy expert witnesses employed was to try and stay "cool", to be removed from and untouched by the battle insofar as possible. In this response style, scholars answered all the questions posed to them as courteously and carefully as possible. If a challenge hurt, or was about to hurt, they did not show it. In fact, as far as their behavior was concerned, we would not have known they have been part of a contest at all. Only their subsequent revelations in an interview suggested what really went on inside. Possible examples of this strategy include interactions that led to comments such as "I don't know", "If you give me an honest man's leeway", and "I do not follow that closely the legal status of who is challenging whom..."

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[8] As in the prior section, our discussion of "strategies" is a process of inference we make from observations of an interaction. We can not seriously imply or impute deliberate intent to any specific attorney or scholar in this regard. To a considerable extent, the general inferences we make about experts' strategies are supported by our interviews.

A second strategy experts utilized during stressful cross-examination involved parrying the opposing counsel's questions. For instance, the expert may have asked the attorney to repeat or rephrase questions that he or she did not want to answer, or may have wanted to think about. At the very least, such an approach stalled for time; at best, the attorney may have decided it was not worth while to pursue the issue. A related approach involved experts in reinterpreting questions (often to themselves), and then answering the question they wished to answer, rather than the one that was asked. If the attorney asked a vague question to start with, this would have been an effective device. Even if the attorney asked a fairly direct question, this strategy permitted the expert to make the points he wished to make, or to avoid a direct response to an uncomfortable question. In order to counter this tack, the persistent attorney must interrupt, point out that his question has not been answered, and begin again. Possible examples of this strategy include comments such as: "I do not follow the question", "I did not understand the question", "I think the way to achieve school integration is through housing", in response to a question about the desirability of school desegregation, etc.

A third strategy experts used during cross-examination was to concede voluntarily minor errors or damaging admissions before they were introduced or emphasized by opposing counsel. This "fair-minded" behavior may even have gained extra credibility points, while at the same time defusing a potentially embarassing contradiction or error.[9] Examples of this strategy include comments such as: "I would now soften what I said", "I think you dignify it to call it an investigation", "I could be mistaken".

A fourth strategy included obfuscation, or the attempt to cloud a problematic question and response with jargon, circular reasoning, or plain doubletalk. This is a dangerous strategy, since if it exposed as such, it could damage the credibility of the witness. However, it is hard to challenge directly, or to impute such motivation to normal scientific jargon. Possible examples of the recognition of this strategy in action, however, include the comment: "Don't those three negatives manage to make it come out just right?"

A fifth strategy utilized by some experts involved counterattacking when the attorney appeared vulnerable. Most lawyers recommend that their expert witnesses avoid this approach, because it does more than defend against attack; it opens up whole new avenues for challenge and response. As such, it might sacrifice the expert's credibility for minimal and momentary gain. Nevertheless, some experts utilized this approach, whether deliberately or because they were provoked into it. Possible examples of interactions leading to such comments include: "He has not studied this either", and "Has this article been published?... Where was it published?"

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[9] In Chapter 7 we indicated how an expert's strategic "fairness" may cloud a very adversarial stance.

All these response strategies by experts are part of the battle for power and control of testimony that occurs throughout the courtroom drama. The escalation of these issues during cross-examination merely highlights the underlying process of the adversarial system. Moreover, these sets of experts' responses indicate that there really is an interaction ocurring, and that experts are not simply passive and neutral agents acted upon by attorneys. Further, opposing counsel and expert are by no means the only actors in these situations. On several ocassions, as we have indicated, judges have become active agents, either in making direct inquiry to the expert or in curbing one or another counsel.

Moreover, no expert is "out there" by herself; the expert who remembers her alliance with her own attorney has an extra resource to rely on when the going gets tough. For instance, several attorneys indicated their willingness to interrupt the cross-examination process to tip off their witness to a trap, to object to a line of questionning, or to otherwise prevent effective challenges to their expert's testimony. The first example of this tactic that we present occurred as the witness' own counsel was conducting direct testimony: opposing counsel attempted to mount a challenge at an early stage of this testimony and was beaten back by the witness' counsel.

COUNSEL: Doctor, in light of what you have just read and the testimony you have given previously, is it fair to say that if a white person is considering moving in an area -- what does FHA say -- with an incompatible racial element, that figuring up what he could pay or would pay for a mortage, FHA is suggesting here that he include in the cost of a private school or transportation to a private school or another school which is more compatible racially?

WITNESS: Yes. That's what this section suggests.

COUNSEL: Is that the situation that prevails today as a practical matter?

WITNESS: As a practical --

OPPOSING COUNSEL: (Interposing) In this community?

COUNSEL: In general, is my question.

OPPOSING COUNSEL: I believe it would be better to limit it to this community.

COUNSEL: My question is in general. If you want to ask questions, you wait until your turn.

We can expect that when opposing counsel entered cross-examination this line of challenge occured again.

Another example of attorney intervention in cross-examination occured as opposing counsel was questionning a witness' relationship to the case, and whether he had demonstrated a potential "interest" (stake) in the case.

OPPOSING COUNSEL: I would like to establish a few facts with respect to your involvement in the events preceeding this litigation directed to the litigation.
As I understand it, you are the one who decided to make a contact with counsel for the Plaintiffs in this action; is that correct?

WITNESS: That is not correct.

OPPOSING COUNSEL: Would you tell us what the contact was then, or who made the first contact to your knowledge...

[...]

COUNSEL: I think I am going to object to this line of questionning on a number of grounds.
In the first place, I don't think it is relevant to anything. I also don't think it is proper cross-examination.
I do not think it goes to any of the issues raised on direct.

THE COURT: It may and may not go to credibility. The Court fails to see the relevance.

OPPOSING COUNSEL: It goes to bias.

Thus, the variety of strategies used by attorneys and experts, and the examples of interactions presented in this chapter, indicate some of the battles that occur during cross-examination. The series of challenges to experts' expertise and expertness, set within a normative structure of adversariness, make it difficult for experts to maintain sole control over their courtroom behavior. In many cases, it also is difficult for experts to present the kinds of testimony they wish to present, in the manner they wish to present it. Despite their best intentions, the structure of relationships in the courtroom generally presses experts into a tug of war with the opposing attorney, a tug that is more or less directly connected to the underlying battle between plaintiff and defense parties. Thus, while plaintiff and defense parties spar for control of the courtroom, and for the interpretation of the facts of the case that are offered in testimony, experts appearing on behalf of these parties inevitably are drawn into this contest. The battle for their resources, and for interpretations of their expert offerings, involves them with the attorneys in a struggle for control.

CHAPTER 13

INFLUENCING THE JUDGES' MINDS (OR AT LEAST THEIR ORDERS): COLLABORATION, CONVERSION AND COERCION

In Chapters 2 and 9 we discussed the litigative strategies attorneys have used in the school desegregation cases, relying on observations of the course of litigation as well as direct conversations with these attorneys. In Chapter 3 we discussed the kinds of social scientific evidence offered in these cases. Moreover, in Chapters 9 and 11 we reported some comments from scientists, attorneys and judges regarding the potential or actual approach and impact of these legal strategies, and expert testimony, on the judges. In this Chapter we take this particular focus further; we extend our analysis of the ways in which various parties try to influence the judge. First, we briefly establish the context of judicial decision-making; any coherent review of the actions of members of the federal judiciary regarding school desegregation must examine the partisan political context and background of their roles and actions. Then we examine how various participants in school desegregation litigation view the process of judicial decision-making, and the strategies they use (or perceive being used) to influence this person and process.

Introduction to Judicial Decision-Making

Idealistic conceptions of the law, and of legal processes, often presented judicial decision-making as immune from external influence processes. This "mechanical" theory of public law presumed that judges "found" the law and applied it in a logical and detached fashion to the facts of the case at hand. The growth of legal "realism" challenged this tradition with a different version of decision processes. From Oliver Wendell Holmes, thru Judges Cardozo and Frank, legal realism drew attention to the impact of judges' attitudes, values and background experiences on their decisions. The social sciences increasingly sought to understand and measure these factors, and to utilize them in explaining individual and group behavior of the judiciary.

One basic question addressed by legal realism was how to explain that different judges read legal precedent or the case record differently. Some realists drew upon the development of the social zeitgeist for their answers, as expressed by Judge Cardozo:

> If you ask me how he is to know when one interest outweighs another I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself (1964: 15).

As Schubert has identified however, there were other emphases in the growth of the realist tradition:

> ...for Holmes, realism was a temper, the mood of pragmatism; while for Llewellyn, realism was only a method, and the "method" was to get at the real facts and issues that underlie legal controversies and the procedures employed to resolve them. For Cardozo, realism meant to understand the values of the judge, since the judge's personality was the only funnel through which policy norms could enter into judicial decisions. Frank, who was more influenced by Freudian psychology, shifted the focus to the unique set of life experiences of judges which shaped their individual value patterns... (1963: 100).

All these emphases directed attention away from the manifest content of litigation itself, and away from a judicial concern for purely logical consistency amongst a set of legal norms and precedents. Clearly they tend to a more structural view of the judiciary, let alone of the issues in any particular adjudication.

Despite these developments in the social scientific analysis of the legal process, many scholars still cling to the mechanicial theory, admitting only the minor or deviant influence of "sociological" or "psychological" factors; or perhaps a major influence under extraordinary circumstances. Consider, for instance, Goldman and Jahnige's report of the dominant view:

> Conventional legal analysis considers the conversion process a relatively straight forward process, although one that ocassionally allows for judicial creativity to fill in the blank spots in the law. For the most part, it is argued, judges decide specific cases by examining the facts of the case and the law that is supposed to govern that situation. When the law is unclear judges examine previously decided cases with similar or analogous factual situations and decide in accordance with the precedents. If there are conflicting precedents or if no precedent appears applicable, judges are free to distinguish the case before them and decide according to their interpretation of what the law requires (1968: 165).

Thus, the move toward legal realism as an interpretive frame hasn't completely altered underlying assumptions about judicial decision-making. Large portions of the judiciary, and legal scholars, still like to think of judges as relatively immue, or at least striving to be relatively immune, from non-legal influences. In this context, neutral and logical processes of information gathering and analysis are seen as legitimate, but other psychological and social structural influences still are an anathema to the concept of an independent judiciary.

If the judiciary is influenced by the external environment, how so? If the judge is not a Tabula Rasa, but carries personal and social biases into a case as a normal process, how does this occur?

External Influences on the Judiciary

There are, of course, various views of the nature of external influences on judicial decision-making. Some approaches, rooted in a functional, individual and/or consensus interpretation of social systems, see law and the judiciary as relatively neutral arbiters of social conflict. Other approaches, rooted in a structural or conflict interpretation, see law and the judiciary as more or less constant interpreters and agents of the interests and values of social elites.[1]

The mechanistic view of judicial decision-making is consistent with a consensus approach. In this view, judges can make decisions relatively mechanically because they and the State represent that basic and underlying value consensus. In the interests of fair and impartial issue-adjudication, judges can rise above narrow group interests to apply neutral or transcendent problem-solving criteria. As Peltason suggests:

> Studies of the judiciary still rest upon a picture of the judges standing outside the group struggle, applying rational standards to a variety of factual situations (1964: 50).

This view is quite similar to the objective and neutral stance emphasized by those experts trying to adhere to social science norms and roles in the courtroom.

If the situation is viewed from the vantage point of a conflict approach, it changes somewhat. If there is controversy and struggle in the society at large, judges and others are involved in, or at least connected to these struggles; they must deal with deeply embedded conflicts of interest. Their apparently rational processes reflect, at least in part, their own backgrounds and training. Moreover, the State is not a neutral arbiter in this view; rather, it is one of the parties, representing powerful groups and interests. As agents of the State, judges represent a party in a community controversy and can hardly be expected to stand outside or above it. Judges may make individual decisions relatively fairly, but not without themselves reflecting the different interests and interest groups they come from and are involved in.

Regardless of the particular approach (consensus or conflict) taken to this problem, the growth of legal realism stressed that judges are social beings, involved in a social and political context that puts pressure on them and their unique role. Since each party to a legal controversy wishes to win the case, they will extend themselves to manipulate various psychological or sociological factors to influence the judge in their direction. Moreover, the very nature of the desegregation controversies challenge a removed stance: the issues are too hot, too big, and too deep to be contained easily by any actor's rationalist ideology and claim to objectivity.

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[1] See the discussion of these competing ideologies or worldviews in Chapters 1 and 2.

Social background factors. Among the influences upon Federal District Court judges are their own social backgrounds. In his study of the southern federal judiciary in the early school desegregation cases, Peltason indicates that of his "58 lonely men":

> All of the judges distributed among the 28 district courts are white southern males. No woman has ever served, and since Reconstruction, no Negro. Only 5 were born outside the South; only 5 earned their law degree north of the Mason-Dixon line... The judges come from the same general social, economic, and political milieu, and reflect the same attitudes, as do the men serving the South as governors, etc. (1971: 5).

Goldman and Jahnige report that..."historically high social status and wealth have been greatly overrepresented on the federal bench" (1971: 65). This should come as no surprise. According to the consensus view of the society and its schools, talent should rise to the top of the stratification ladder, and therefore, people of talent and competence should have wealth and status. According to the conflict view, wealth and status are seen as the trappings of power, and they are passed on from one generation to another. Thus, members of privileged groups (economic and otherwise) should control powerful positions such as the judiciary, and vice versa.

Nagel's (1964) studies of state and federal supreme court justices indicated that judges from Anglo-Saxon heritages and high-status religious denominations (Episcopalian, Presbyterian, Congregationalist), were more likely to decide social welfare cases conservatively (e.g. against underprivileged groups) than were non-Anglo-Saxons or judges from lower status religious denominations (Catholic, Baptist, Jewish). Nagel also found that Democratic party judges scored more liberally on scales of political values than Republican judges, and that Democrats also made more liberal decisions on these cases than did Republicans. He sees party affiliation as more potent than background itself, indicating that in all likelihood background factors influenced party affiliation, which then played its own more potent role. As he notes, the influences of these factors probably are not conscious, and judges probably are not acting out of a conscious sense of group interest; but rather, they "rely on personal standards of value in reaching a decision, and these same personal standards also frequently account for their party affiliation (Nagel, 1964: 246).[2]

As a partial result of these background factors, many judges are rooted deeply in the local elite structure of their community or region. Even if they did not spring from such origins, their elevation to the judicary typically cluminates a process of political (or in some cases scholarly) activity that has made them visible and potent organizational and community figures. As part of the current elite system, they can be expected to share (and be loyal to) elites' interests in maintaining a stable social order, traditional control of schooling, prior racial patterns, etc.[3] In exchange for influence in these circles of local or even regional power, judges are influenced by their friends and neighbors, colleagues and collaborators. As Chambliss and Seidman state: "A judge who is anxious to maintain his power in these informal groups cannot permit his opinion to deviate very far from the value-sets held by those with whom his web of live is so closely interwoven" (1971: 89). In a similar vein, Judge John Minor Wisdom has expressed the view that "the district judge is personally accountable to the local community, and to the local bar." He is tied to the region or area he serves by a complex and wide ranging set of interpersonal interactions, as well as histories (Richardson and Vines, 1970: 37). At the same time, many judges are committed to the realization of constitutional and national principles, and concerned about remedying overt racial inequality and injustice. Thus, judges bring these different personal persuasions and social connections to the problems of differentially weighing a variety of legitimate interests: community control of schools, equality of opportunity and access to public services, professional control of schools, needs for social stability and social change, etc.

Role of the Court System. The federal court system was constructed out of a series of compromises between the concern for a national and central judicial structure and the preservation of local traditions and standards in the adjudication of controversies. The local federal district court is the most locally accountable part of the federal judicial system; as such it is caught between these counterveiling pressures. For instance, as Rodgers and Bullock have indicated, during early desegregation controversies in the South:

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[2] Despite the intuitive sense that these background characteristics should have an impact on policy decisions, especially those related to race and class issues, several studies fail to demonstrate decisively the relations between them and decisions on civil rights and urban policy issues (See the summary and critique by Grossman, 1967). Of course, with little background variance among judges on key factors of class and race, and with a minimally discriminatory dependent variable (yes/no on a case), the low correlations should not be surprising. It would be interesting and useful to conduct more detailed and complex studies of intra-judge thinking and inter-judge interactions in such cases.

[3] Chapter 1 discusses elites' interests in local desegregation controversies.

> district judges soon learned that if they enforced the law in good faith and found themselves facing a hostile mob, a recalcitrant governor, a determined legislature, or an immovable school board, they could not be sure of being backed up...The extreme vulnerability and isolation of district judges were soon made clear. To be effective the district courts need the power and prestige of the federal government behind them (1972: 78-79).

Courts are embedded in the local district and community, and so are the judges. When decisions are made that run counter to community consensus or powerful interests, resistance to the court and the judge can be expected. Since the judge is part of that local tradition, the anticipation of reactions from the community must weigh in his conscious and unconscious thoughts.

The process of appointment and promotion in the federal court system also may influence judges, since it requires several screenings by local and national political figures (Chase, 1966). Typically, an appointee to the federal district court has to be recommended by the Senator serving his district, as well as by local party officials. In addition, the Justice Department, the President, the A.B.A. and other interested lobbying groups have a say. As Johnson has indicated:

> In a political system characterized by the deep involvement of a multiplicity of special-interest groups acting in very direct and informal ways, it is to be expected that such groups will necessarily approach the Court both through very formal channels and in very indirect ways...special interests may attempt to gain access in a rather indirect fashion by striving to influence the recruitment of justices of "proper" thought patterns (1967: 31).

Since the official judicial ideology suggests a judge should be free from such influence after appointment, the process of recruitment becomes even more critical as a relatively final gate-keeping mechanism.

The judge's informal relationship to his colleagues also can be an influential factor. Conferences of the judiciary, at the District, Circuit or Supreme Court levels, can open a judge to the influence of his peers. Murphy's (1964) analysis of the Supreme Court illustrates the role of friendship and respect in the process of intra-court bargaining for a majority view or for a fully unanimous position.

He discusses the role of leadership in the Supreme Court, and the ways in which official role (as Chief Justice), logic and persuasive power, cooptation through political privileges or influence in gaining plums, doing favors for others, and bargaining (trading resources) and compromise all play a part in mutual influence processes.

When a judge's decision is appealed, the formal process of judicial review becomes an additional source of influence. Here, other judges review their colleagues' work, and comment on their abilities and judgement...and perhaps as well on their politics. Prior reviews become part of the legal precedent, and can have direct influence on judicial decision-making. However, anticipatory response to a potential review may be a more informal external influence on the judge.

Strategies of Judicial Influence in the Desegregation Cases

The acknowledged context of the school desegregation cases is a socio-political setting in which several different parties, and their representatives, are engaged in an adversarial proceeding. Each party and interest group seeks to influence the judge to settle the controversy in their favor. In this section we describe and illustrate some of the influence strategies used. The discussion that follows often is inferential, and utilizes a variety of data bases, all less systematic and adequate than we would prefer. For instance, we draw from conversations with the 10 Federal District Judges interviewed in this study, as well as from the interviews with attorneys and scientists, as reported earlier. While the 10 judges in this sample are in no way representative of Federal District Court Judges across the country, the issues and problems they faced in adjudicating these desegregation controversies are probably quite representative. In addition, we draw from works of other scholars who have interviewed judges, or examined records of their court/case behavior. Nevertheless, the data base is sparse. Thus, this analysis should properly be seen as suggestive and speculative; however, it also appears to us provocative and generative.[4]

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[4] As in much other research on social and political elites, we found these judicial decision-makers much less willing to stand still and be interviewed, to report their thoughts, than were less powerful social actors. For this reason, as well as others, much important analysis and description of the actions of social elites goes unreported and unresearched. Therefore, it seems even more important to discuss these limited data here.

As judges deal with desegregation, they are subject to a variety of attempts to influence them, to direct their decision in one or another direction. The data indicate that litigants (plaintiff and defense), experts, local community groups, elites, friends and neighbors, other judges, etc., use various influence strategies in dealing with judges during desegregation-related controversies. The following discussion describes these influence attempts in terms of three general strategies: collaboration, conversion and coercion. Collaboration refers to the process by which one set of actors tries to work together with another set who already agrees with them, to produce an agreed upon outcome. In this context it refers to the ways in which a plaintiff or defense group tries to work with a judge who is already committed to their argument. Conversion refers to the process by which one set of actors tries to educate or persuade another to change his or her mind. In this context it refers to the ways in which a plaintiff or defense group tries to convince a not-previously-convinced judge of a particular fact set, an entire worldview, or a specific remedy. Coercion refers to the process by which one set of actors tries to force another to act in a certain way. In this context it refers to the ways in which a plaintiff or defense group (or more typically, their out-of-court allies), tries to threaten or force certain judicial outcomes.[5]

Collaboration

One influence strategy that is relatively invisible or covert occurs when judges collaborate with plaintiffs or defendants because of (and through) previously existing commitments, associations, values and beliefs, etc. Sometimes this process of collaboration is conscious and deliberate; at other times it is unconscious. In a sense, what occurs is that the judge's previously existing contacts and views are the context for a decision, and these contacts are strengthened and acted on in court.

Examples of this strategy may include those actions of judges, usually part of the prevailing elite of their local community, when they gather together with other elites at the apex of the school, human service, social control, political, industrial and financial systems of their community. These gatherings may be facilitated by organizations or associations, such as country clubs, political parties, or by local foundations or governmental agencies. In the extreme case, judges may meet with litigants outside the courtroom and advise them as to effective tactics. Such examples do not indicate or predict the direction of influence.

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[5] Scientific discussions of theory, research and praxis efforts related to these influence processes are found in: Hornstein, et al, 1971; Kelman, 1961.

Liberals and conservatives may utilize this influence strategy: it may serve the interests of plaintiffs or defendants. Conservative groups, as well as civil rights associations, at both the national and local levels, often call meetings where judges and attorneys plan strategy together, or just talk with one another. The exchange of ideas, planning of strategy, discussions about how to influence certain members of the bench, are all part of this process.

Peltason provides us with several circumstantial examples of collaboration from his study of judicial decisions in Southern districts. As he notes, the key context for collaboration probably is the strength of a judge's prior views:

> Most southern judges are moderates who favor segregation and who feel, like most white southerners, that the Supreme Court's decision was unwise, but who do not hold segregation as a sacred and overriding principle...A judge to whom segregation is a sacred principle is less likely to move against it than the judge to whom it is not (1971: 8-9).

To not "move against it", regardless of the facts of the case, is an example of judicial collaboration with one of the parties to a case.

One of the judges we interviewed came pretty close to announcing a "sacred principle"; if not of segregation, at least of freedom not to desegregate.

> In my view there should be absolute freedom of choice-no compulsion by the courts about where you go by your race. The only compulsion should be by district. It is unamerican to do anything else.

With such a strong feeling on the matter, it would appear this judge was prepared for a collaborative response to anti-desegregation litigatants. And, indeed, his record from the bench is consistently negative and obstructionist in desegregation matters.

Less direct and obvious reports of close-mindedness came from some of the attorneys we interviewed. Although their comments may have been self-serving, lawyers for both the plaintiff and defense parties sometimes agreed on the judges' prior commitments and their unwillingness to be influenced by the facts of a case. Consider these general comments:

> The judge was extremely powerful, aggressive, intelligent, competent and very activist on segregation. He felt very strongly that segregation is wrong.
>
> The judge had his predisposition already. He was going to rule against the school board no matter what.
>
> He had formed his opinion already.

> The judge knew what he was doing and what he was going to do. It was a personal preference or bias on the part of the judge and he didn't need persuading.

Several other attorneys suggested a judge was "blind to the other side." Neither "liberals" or "conservatives" appeared to have a monopoly on such blindness, however; judges notoriously partial to pro and anti desegregation forces were included in this category. The results of such a process may be that an unfair trial record is built, testimony is unfairly excluded (or included), and requests are made to recuse certain judges.

In the history of school desegregation decision-making by the judiciary, there has been a series of efforts to "educate" members of the judiciary for the new complexities of their roles. In one sense, education may be seen as fairly neutral attempt to pass on technical knowledge and details. In the context of the courtroom, however, education typically is an influence effort, designed to persuade or convince the judge of one or another party's views. A variety of conferences have sought to bring together judges and attorneys, as well as social scientists, to consider desegregation-related issues. At times, they have been advertised as efforts to review new technical developments in the law or social sciences. At other times, they have been rather explicit efforts to share strategic information and to establish a collaborative process to manufacture a new consensus on policy and program.[6] Thus, we see a pro-desegregation collaboration as the influence mode utilized in conferences such as the following:

A School Desegregation Research Agenda Conference in May, 1980.
- In attendance were two federal judges with a pro-desegregation record.
- Also in attendance were at least 7 attorneys generally identified as counsel for one or another civil rights agency or group.
- Also in attendance were a number of social scientists who either had a history of testimony for plaintiff groups or of conducting research used to support such groups.

A Sociology of School Desegregation Conference in December, 1975.
- In attendance were two federal judges with a pro-desegregation record.
- Also in attendance were at least 5 attorneys generally identified as counsel for one or another civil rights agency.
- Also in attendance were a number of social scientists who had or would in the near future appear for the civil rights' plaintiffs in court.

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[6] The difference between education (later called conversion) and collaboration lies in whether anyone from the "neutral party" or "opposition", whose mind needs to be changed, is present.

At neither of these two conferences were lawyers present who represented defendant school boards. Nor were there in attendance social scientists who regularly appear as experts for defendant parties.[7] Nor were there judges in attendance who were "known" to oppose desegregation as a national policy, or to consistently find for the defense. It appears that defense parties also conducted conferences and informal meetings of their own. As has been true in general, however, civil rights advocates and their various collaborators have been better organized at the regional and national level.

Several of the judges we interviewed attended such conferences. Their comments downplay the "collaborative" or "influential" aspects of these sessions, but the careful reader can discern at least the potential of an influence process at work.

> I did go to a two-day session of judges in Washington. It wasn't at all publicized, and it shouldn't have been publicized. Some of the judges were under serious possibility of physical attack. I think there were 25-30 district court judges who attended this meeting, but no conclusion was reached. No record was made, but I think the discussions and conversations were very important.
>
> There are Foundation seminars where we generally have a case study... at one conference we used Denver. We used it as a starting point, and we have big city educators and we have federal judges. We also talk not only about matters of school desegregation, but other areas where federal judges are involved in schools. A lot of ideas are traded around.
>
> You have to assure them (the judges) there's nothing irregular, so they're sure they can talk freely. Once that happens, federal judges are very eager to talk, because we don't get to go anywhere and do this. Its a great opportunity to sit around with some great people who you've heard about early on in the history of school desegregation...Skelly Wright, Constance Motley, etc.

These examples of a collaborative influence process are a natural part of the social structure supporting the judiciary: thus we have elected to label it collaboration rather than collusion, or some pejorative term. Some observers also may suggest that rather than collaboration, or in addition, we might term this process cooptation or even education. Perhaps so; perhaps actual collaboration is too difficult to detect from these examples. In the next section, however, we illustrate the use of educational tactics more directly.

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[7] As indicated in earlier chapters, most expert witnesses become identified as a plaintiff witness or a defense witness. A few switch sides: and of those who do, even fewer ever switch back.

Conversion[8]

The strategy of exerting influence through collaboration generally focussed on ways in which judges' pre-existing views were strengthened and acted out in court. Another way in which pre-existing views may be influenced is to alter them via conversion. This strategy attempts to change a judge's view of the nature of the local situation, or the evidence for violation or remedial matters, or of the relative ranking of various factors or variables in a case. Conversion refers to the process of both cognitive (information) and emotional (affect) change in views that occurs as a function of education (re-education) or persuasion.[9] It can affect a new world view (e.g. paradigms such as structural v. individual or conflict v. consensus), a new conception of factual matters (e.g. explanations of harm, white flight, differential achievement), or a new notion of cause and affect relations in complex social situations (e.g. reciprocal effects of schooling on housing).

In the legal tradition, this is part of what "ought" to be happening in these cases. Judges should be being exposed to new information and ideas, new ways of perceiving old realities. Based on their own experience, they can assimilate and order new information and create new law and public policy to deal with emergent problems and issues. Thus one attorney simply presented this approach as part of his legal strategy:

> The strategy we used was to educate or re-educate the judge.

And several judges noted their changed views as a function of experience in and out of the courtroom.

> You asked how you get educated and I suppose its absorption of some kind of everything you hear and see and experience over a long period of time,

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[8] As the following discussion clarifies, we use the term "conversion" differently than do most politicial scientists who have analyzed judicial decision-making. We mean to describe an influence process, and process of internal change in an actor. Other usages of the term refer to the way in which judicial actors weigh inputs and come to the conclusions; thus they "convert" inputs to outcomes.

[9] In some applied social science contexts it is called "enlightenment".

> In observing my own children, it's obviously broadened them. In their lives to be lived, I'm certain they will get along with their fellow men better than my generation, because they were required to associate with one another.
>
> The lawyers still perceive the fact-finder, whoever he is, as someone who must be persuaded. And he is sensitive to extraneous things. Its not a pristine system and I think that's what lawyers have in mind.

Richardson and Vines quote a study of the effects of such education and conversion on Judge Waring of South Carolina's Eastern Federal District. In the judge's words:

> I'd never thought about the race problem, most of my life. ...I'd never met any Negroes, except as laborers. Then in the courtroom I began to see the realities and inequalities. It gives one a sense of futility at times...I began to see illogicalities, and suddenly the whole segregation system appeared absurd (1970: 99).

And one of the judges we interviewed reports a very similar process of learning or changing.

> I thought segregation was an incidental question until I began to learn something about it from the testimony. In fact, the schools were still badly, well almost completely, segregated. It was these facts, not opinions, that were important. It took several months of studying to recognize that, as far as race was concerned, all things took place with the action of the state, county, city school board and federal authorities.

In the same vein, an attorney reports his observations of another judge:

> Judge Roth is a classical example of where an educational process was required. Judges are often people who have lived in a largely white cocoon, all their lives, because of segregation: white prep schools, white colleges, white downtown clubs, white offices, in many instances. And the whole notion of the significance of racial experience in this country has to be presented in some guise at some point, to sensitize them to get their attention to what the case is all about. Consequently, there is strong arguments to be made for: "Look your honor, let me set the stage for what the rest of the play is to follow. I will explain to you in a way that you probably do not know first hand the role of race in our history in this country."

For plaintiff lawyers, the need for a conversion strategy flows from assumptions about the ways in which judges are prepared to operate from an individualist conception of segregation and race relations. Support for a structural interpretation requires education and change. Moreover, the strategy is rooted in assumptions about their embededness in the norms and culture of the local white communities. Unless special "educational" steps are taken, one might assume a pattern of judicial collaboration with these traditional values and policies.

It is in the use of a conversion strategy that social scientists are most likely to be useful and effective in litigation,[10] despite some observers' feelings that social scientific evidence may merely be another form of "common sense" (Cahn, 1955). In some cases it may be that, sort of dressed up. However, if common sense is the refelection of, or the outgrowth of, a series of culturally acceptable myths and mores, ideologies and realities, common sense on racial matters, at least until World War II, was that blacks were genetically inferior to whites. After the second World War, common sense held that they were at least culturally infer to whites. Neither "common sense" position boded well for concerns about constitution equality, nor about remedies for existing inequality, especially in schools. If alternate conceptions of American race relations are not "common sense", social science has been at least partly responsible for educating or converting large portions of the population - including some members of the federal judiciary, to these new views of social reality.

Some social scientists appear to have been instrumental in personally and directly affecting a conversion of select judges. This may be an outgrowth of searching personal conversations, sharing new social experiences, or presenting facts and figures in rational manner. One social scientist reports his role in the conversion of a judge - the same judge who reported his conversion earlier, in the following terms:

> After I was his consultant, the judge and I went to visit a minority neighborhood. It was a bum neighborhood; it was an awful slum. There was a superhighway around behind them, and they were locked in to this neighborhood, and it was just a very inferior neighborhood with very inferior housing. And the judge said, "These kids never get to know what a beautiful city they live in. They never see what a lovely place my city is. You get those kids out of here."

This report of conversion is verified by the judge, other are not. Even without verification, consider another scientist's report of his role in the conversion proces

> The focus in testimony was on tracking at the junior high school level. I brought in the whole concept of the common school, the school as a place where you get common learning for everybody in contrast to differentiated objectives/goals for different kids. The judge said--"You wouldn't recommend such a thing?"--and I said: "Yes, I would." Then he kept pressing me and arguing

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[10] Chapter 9 discusses some lawyers' perceptions of this strategy, and their reasons for using social scientists to help educate or persuade the judge.

[11] It is, of course, dangerous to accept one actor's (scientist's) word that she helped convert another (judge) as accurate. However, the first excerpt, as noted, was verified by the judge.

> with me. So I was talking about remedy for the differentiated and unequal tracking operation. I might not have had all the evidence to back it up, but I was pretty sure of what I was saying. The Judge had announced at the beginning that his decision was going to be to uphold the tracking system, but they could make a case for appeal. When the trial was over he ordered the tracking system stopped--which was a complete surprise.

A critical factor in judicial conversion is the judge's openness to the kind of information being transmitted, and to the agents of that information. Another is the scholar's ability to deliver useful material in a useful manner. In Chapter 11, "Characteristics of a Good Witness", we delineated these characteristics as perceived by various actors. Some of the things judges said about good witnesses included a concern for qualities of expertise, particularly "credentials" and "a good grasp of information","educational training" and "experience". In addition, judges also stressed qualities of expertness, "sincerity", "a balanced approach", "witnesses who weigh their knowledge", "deameanor and appearance", "relationship to the parties or the subject matters...interest in the outcome", "common sense".

Once a judge has been converted, and sometimes this process is quite dramatic, he may play a role in converting other members of the bench. Or he may become an active collaborator with plaintiff or defense parties. This can be accomplished at informal conferences such as those discussed in the prior section; or in official hearings. Consider the following report:

> The theory of the three of us sitting is that we felt a group judgement was better than one man's. We'd get in there and maybe one judge would say, "Gee, that either looks right or doesn't look right to me", and others would say, "But you remember the case of so and so, or I had a case last year that involved this one district." So in terms of standards and remedies, we learned from each other.

Several studies of Appeals courts and the U.S. Supreme Court discuss ways in which colleagues attempt to educate, persuade or otherwise convert one another (Murphy, 1964). It is a natural and common process.

Coercion

Another strategy for influencing the decisions of the judiciary is coercion. Here, the concern may be less with altering views than with altering behavior, and/or judical orders. Some may prefer to utilize the terms threat or even persuasion rather than coercion, since absolute constraint or force is not being applied. However, to the extent compliance rather than commitment may result, the major difference between this strategy and conversion is the most important issue. There are clear limits to the use of coercive tactics with regard to the federal judiciary: their power, their power to strike back, their insulation, and their lifetime appointment all mitigate against this strategy. Despite these limits, it is clear that it has been used for plaintiff or defendant interests.

Some coercive tactics are legitimated within the judicial structure: they include recusals, and successful appeals and reviews. Thus, it is normative and acceptable within the judiciary for parties to threaten or actually try to have the ju removed from a case for certain reasons of bias, conflict of interest, etc. In Little Rock, for instance, attorneys for the state asked Judge Davies to disqualify himself "since he had a personal prejudice" (Peltason, 1971: 170). In Virginia, Senator Byrd "charged Judge Hoffman with ungoverned prejudice" (Peltason, 1971: 211).

The Supreme Court or Circuit Court of Appeals also may overrule a District Court Judge, and require him to rewrite his order to come up with a different sense of violation, or a different remedy. This attempt at control and constraint may, at times, include public chastisement. Murphy suggests how this activity may impact on a judge:

> The Supreme Court can act to counter lower court power. While it cannot fire and hire new personnel as the President sometimes can do, the Court can review and reverse inferior judges. This is important beyond any effect on a particular case. Judges, no more than any other men, enjoy the prospect of public correction and reprimand. The Supreme Court can put added bite to the psychological whip by sarcasm and scathing cirticism of its own (1968: 312).

As Apellate or Supreme Courts seek to uphold their reading of the constitution, they may attempt to coerce lower courts to abide by and implement their rulings. Superior courts generally go about this process rather gently, but on ocassion the message has to be made clear and forceful. Peltason reports, for instance, that Judge Atwell, hearing the Dallas case:

> twice refused to comply with the Supreme Court's segregation rulings, and did so only after stern orders from the court of appeals (1971: 17).

Moreover, as Rodgers and Bullock report, the Fifth Circuit became somewhat exasperated in 1967, and informed a district judge that:

> This is the fourth or fifth appearance of this case in this court, considering both temporary measures and appeals on the merits. We simply do not consider it worthwhile to take the time to canvas the exact number of times in which we have been called upon to correct the actions of the District Court for the Southern District of Georgia which have been brought to us for review (1972: 78).

Sometimes, on the other hand, higher court leadership and review has been lax or unfirm, and the Supreme Court may be reluctant to use their coercive power. Perhaps they may be unsure of their ground, or of how much pressure or influence they can place on lower courts, or how much lower courts actually can do in their local communities. Whatever the reason, the result may be as follows:

> Cases remanded to the lower courts often allow wide latitude in the implementation of Supreme Court decisions, and the norms and policies inculcated in lower court decisions may be virtually unrecognizable as decendants of the original Supreme Court decision (a classic example is the school desegregation case; Brown v. Topeka) (Richardson and Vines, 1970: 145).

In such cases, and when lower courts engage in evasion or resistance to gentler forms of influence, other legal and political groups may become concerned and active. For instance, Vines (1971) refers to the _Yale Law Journal_'s 1963 critique of the performance of Southern district court judges in the desegregation cases.[12] Such review and critique generally may be considered acts of conversion, attempts to influence with reason and persuasion, since the _Journal_ has a prestigious readership and an influential history. However, Vines notes that in this instance the _Journal_'s unusual...

> proposals for 'discipline' of judges because of their conduct of the judicial process or their court decisions...is one sign of the pressures that were building for Congressional and executive action 'to control and coerce' the judiciary (1971: 263-264).

More covert forms of influence can be seen in retaliations against certain judges by elite political or judicial figures. In this vein, some talented lower court judges may fail to be elevated to Courts of Appeals (or even to the Supreme Court) because of their orders and stances on matters of school desegregation. The President, other judges, local political leaders and members of the Senate all may be involved in applying such coercive measures, and in "sending the message" that coerces others to fall into line. For instance, Richardson and Vines (1970) report that as a result of Judge Skelly Wright's findings supportive of desegregation in Lousiana's public schools, a Louisana Senator blocked his appointment for a promotion to the Fifth Circuit Court of Appeals. He was later appointed to the Appeals Court in the District of Columbia. Moreover, Chambliss and Seidman note that most judges want to advance and be rewarded for their work:

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[12] See: "Judicial performance in the 5th Circuit" _Yale Law Journal_, 1963, 73; 90-133.

> Judges, like everyone else, want increased status, power and privilege. The appellate judiciary is itself a career. The judge who is promoted to an intermediate Appellate State bench may yet be promoted to the highest state court. The judge of a Federal District Court may hope some day to be elevated to the Supreme Court of the United States. Judges cannot but be aware that their decisions will be a principal index used in their promotion. When Judge Burger of the U.S. Court of Appeals for the District of Columbia was promoted to Chief Justice of the U.S., it was quite clear that his conservative stance in judging was a principal consideration in his promotion (1971: 89).

Thus, the appointment process can be used as an influence strategy in both ways, as a reward or punishment.

Guerilla actions in the local community also may be utilized as part of a coercive strategy to influence judicial action. The disestablishment of structures of racial supremacy in northern or southern communities is a serious business. So is the alteration of white privilege or racial separation in schooling and public services. Local community members, elite "friends and colleagues", or grass roots' supremacists and others opposed to desegregation may attack the judge. Peltason indicates that a number of judges who made decisions pressing for desegregatio in the South suffered retaliatory acts from their community members and from local and state political figures. Some have found it difficult to continue socializing with people who object to judicial intervention, apparent undemocratic imperialism, racial softness or federal tyranny.

> Judges who have issued antisegregation orders, however mild, have been forced to discontinue the public listing of their telephone numbers, to avoid anonymous and obscene telephone calls made round-the-clock. Their mail has been loaded with threatening letters. Some have been forced to seek police protection for themselves and their families (Peltason, 1971: 10).

Judge Waring, for instance, was subjected to substantial abuse and coercive influence after he dissented from a South Carolina court's ruling that segregation was constitutional. According to Peltason, "He became the target of intense local abuse, his live was threatened, and his wife was slandered. Shortly thereafter he retired from the bench and moved to New York" (1971:10). In addition, Richardson and Vines indicate that for some southern judges:

> Graves of their relatives were desecrated, crosses burned on home lawns, dynamite blasts set off near relatives homes, and professional ostracism was inflicted by local bar groups (1970: 99).

Even milder forms of retaliation, probably not quite deserving of being called coercion, can be discomforting. Consider the report of one judge we interviewed.

> I haven't had any direct threats. But what is more telling for me is the sense of being somewhat ill at ease. Not anything happens that anyone would call derogatory; you go to a party and everybody still gives me the glad hand, but they seem to cordon you off. "Yeah, it was really a great decision that you wrote." I don't think it really was a great decision. On the other hand, you get the other group who says "Well I think you produced a good piece of writing but I disagree with you emphaticially." I don't need any of that at the football party either.

Other judges we spoke with reported being unable to get local TV repair service, seeing their wives harassed and verbally abused in supermarkets, and being called "an old drunk" or "senile" in the men's club.

Of course not all these coercive influence strategies are effective. Some lower courts fight back or evade review (Murphy, 1968), and harrassment sometimes stiffens a judge's resolve.

> All the judges involved in integration get a tremendous amount of letters and telephone calls, some abusive, but I don't think that's really changed me.

Reflections on Alternative Influence Strategies

All three strategies of influence are not equally effective; moreover, not all can be used with equal facility by all parties. For instance, the relative power a party has at its disposal directly affects which influence strategy it can apply: it takes a great deal more power to make coercion work than either conversion or collaboration. Collaboration can be affected within a pre-existing climate of trust and connection, whereas coercion is usually a response to the absence of these conditions-at least its absence for one of the parties.

The nature of the party makes a difference as well. Given the nature of the issues surrounding desegregation, we indicated in Chapter 9 that conversion was more likely to be used by plaintiff groups than by defendants. It is the plaintiff that has had to create, and depend upon the creation of, a new explanation of segregated schooling and a new vision of more positive racial relations and educational programs. The defendant can gain from the maintenance of pre-existing views of "common sense", just as they win by orders maintaining the pre-existing status of school systems.

Core factors in litigants' election of an influence strategy probably include: 1) their ideology and/or assumptions about the judge's stance - assumption of an existing value consensus probably leads to collaboration, assuption of a potential consensus probably leads to conversion, and assumption of continuing value differences probably leads to coercion; 2) amount of resources available - few resources probably leads to collaboration, many resources means they can be applied despite resistance, implying potential coercion; 3) kinds of resources available - social network resources probably facilitate collaboration, intellectual resources probably facilitate conversion, and political resources probably facilitate coercion; 4) value preferences - some people simply may feel it is inappropriate to try to coerce the judiciary except by formal means of appeal and review, others may eschew collaboration on principle.

The judge's understanding of the substantive and procedural issues in the case also affects the kinds of influences to which he is open. To the extent a judge sees the issue in individual and private law terms, as one of constitutionally protected rights, he is more likely to rely on legal precedent and record as a guide to a decision. To the extent a judge adopts a structural or public law view of the case, and focusses on fashioning a remedy that the community and board will own and accept, he is more likely to be engaged in a series of social transactions that open him to other kinds of influence.

CHAPTER 14:

PANELS AND PARTY WITNESSES: ALTERNATIVE MODES FOR THE USE OF SOCIAL SCIENTIFIC EVIDENCE IN COURT

In recent litigation of the school desegregation cases, much attention has been drawn to the use of a "panel" of scientific experts. This alternative to party witnessing has been used in the Los Angeles case, and we asked informants in this study for their views of this mechanism. Not many had direct experience with a panel, and their answers often were abstract. However, the issue is so important that in this chapter we discuss this interesting but largely untested option.

As we reported in several chapters, expert testimony often has been described as: one-sided, non-objective, overly simplistic, devoid of sufficient scientific cautions and qualifications, and legally irrelevant. Although some critics have focused their concerns on the experts themselves, others have challenged the context and process by which scientific evidence is introduced into the legal arena. Some would prefer an alternative to the party witness procedure, and have argued for a panel of experts that would be directly responsible to the jduge, rather than to one of the parties in litigation (Pettigrew, 1979; Orfield, 1978; Wolf, 1976). Most writers suggest that the panel be chosen by the judge, and that it present a report on the state of social science knowledge regarding some set of predetermined issues. The following statement reflects one view of how a panel should operate:

> Such a body should provide the Court with a complete account of existing evidence (or lack thereof), indicate the relative coherence or inconsistency of various parts of that evidence, assess the soundness of the research underlying the various findings, report on the support for the findings in the scholarly community, assess the relative stability of the findings, and render a balanced appraisal of the substance (meaning), validity and reliability of the current evidence. (Sperlich, 1980:288).

Expert panels are expected to remove scholars from the adversarial pressures of the courtroom and thus permit them to operate more in line with social science norms. Their link to the jduge, rather than to particular parties, should permit experts to function more as scholars and less as party loyalists. Pettigrew describes the panel role as, "far closer to the role that academic social scientists are accustomed to playing - researchers and writers rather than disputants in an argument" (1979). Thus, participation as a member of a panel should alleviate much of the role conflict associated with being an expert witness for a given party. In addition, removed from some typical courtroom pressures, panel experts may be better able to collect the data they deem relevant and to present it with traditional scholarly detail, complexity and qualification. In short, panels ideally permit experts to regain the personal control that as party witnesses they shared with or abdicated to attorneys.

Should we move toward the use of panels in school desegregation cases? Because lawyers are steeped in the adversarial tradition, while social scientists are trained in a model of scientific neutrality and objectivity, we might expect that attorneys would support party witnessing while social scientists would support a panel (Sperlich, 1980).

Insert Table 14.1 here

Table 14.1 indicates that this expectation is confirmed. A significantly greater percentage of social scientists than lawyers support a panel. But as the table also indicates, the position among both lawyers and experts is far from unanimous. While almost all lawyers oppose panels at the merit state of litigation, they are evenly split at remedy. On the other hand, although 71% of the scholars who had a clear preference supported the idea at a panel at the remedy state, a substantial minority either support the present system at party witnessing or are undecided.[1]

The failure to achieve anything like unanimity by professional role suggests that the choice between panels and party witnessing is more complex than may first appear. Investigations of the interviews with scientists and attorneys suggests that the choice between panels and party witnessing involves basic judgements about several matters in these cases: (1) control of experts and the adversarial process; (2) the proper style of dispute settlements; and (3) the nature and role of social science experts. Thus, to choose between panels and party witnessing is to some extent to take a position on these other issues as well. In the following sections we discuss each of these issues, and indicate how they relate to the question of scholarly panels.

Control of the Courtroom Relationship

Our prior analyses of the interactions between attorneys and experts suggest that one theme that may explain their differential support for panels may be their views of, and desires for, control of courtroom process. In an adversarial system, each side is supposed to advance the strongest possible case in support of its position, and to attack the points presented by the opposition. The value of this system lies in the assumption that it best informs the judge by presenting the pros and cons of every relevant point in the case.

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[1] The attorneys' reluctance to consider panels at the violation state constitutes an even more fundamental difference between them and the social scientists. Scientific experts do not readily distinguish between violation and remedy in their discussion of panels, and those experts who support a panel appear equally willing to adopt this method of producing evidence at both stages of a trial.

Table 14.1

Scientist and Attorney Views of an Expert Panel at Remedy

Views of an Expert Panel	Social Scientists (N=48)	Attorneys (N=40)
Approve	25	18
Disapprove	10	19
Undecided	13	3

$\chi^2 = 9.56$, df = 2, p. < .01*

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*If the analysis is limited only to those informants making a clear decision, in favor and against, the relationships are still significant ($\chi^2 = 3.88$, p. < 05).

This method of presenting evidence suggests a set of relationships between the actors involved in the dispute which is a vital part of the private law model. It implies a relatively passive and neutral judge, who acts as a referee between the parties. The judge generally is not an active "fact finder", he usually leaves this task to the parties. And the parties delegate this task to their attorneys.

The lawyer is thus a central and potent actor in an adversarial system. As the advocate for a party's interest, the attorney is in the best position to marshal and present the arguments for a side. He or she selects, prepares and examines witnesses. As we demonstrated in Chapter 10, selection and preparation includes an examination of the writings and previous testimony of witnesses, and discussions of their probable testimony. These preparations provide the attorney with a fair degree of certainty about the answers a witness will give during direct and cross-examination. Thus, he or she can arrange and order the sequence of expert testimony.

Writers who oppose party witnessing argue that a high degree of lawyer control over the presentation of evidence pushes the expert into an advocacy position (Pettigrew, 1979; Horowitz, 1972). This view is summarized by one of the experts we interviewed.

> . . .There is an enormous attempt (by the attorney) to shape this (the expert's) testimony so that it will push as hard as possible on one side of the issue. In the lawyer's view, at least, the expert is not supposed to express the truth as he sees it. He is supposed to express evidence which will push as much to this side as possible, with the notion that on the other side there will be evidence produced and somehow out of this will arise the truth.

Some scholars support a panel because it removes them from these stresses of courtroom examination. They feel that under less pressure , and with more opportunity for self-control, the quality of their expert testimony may be improved.

> You're not in a stressful situation (on a panel). . . You can easily forget certain facts and details when you're sitting on the damn stand, unless you're prodded. Whereas on a panel you have time to collect your thoughts.

Of course, most scholars agree that the comfort of witnesses is not the issue; the issue is the testimony itself. In this view, many experts feel that not only their personal standards, but the standards of science, are threatened by the adversarial system.

The witness-judge relationship also typically is filtered through attorneys' questions. An expert's testimony, his/her statement to the judge, is not spontaneously delivered but elicited and restricted by the questions the lawyers ask. The adversarial system builds the interactions between lawyer and witness and between judge and witness, on a base of attorney control.[2] Many lawyers recognize the power and responsibility they carry in this adversarial process, and are concerned about its potential delution by a panel.

> Sure if the guy (expert) doesn't come down right I can fire him, but the court's panel, I don't know, hell they might go in any direction.

> When the expert is on the witness stand you can confine him much more than when he is on a panel of experts in which he is free to bring his own personal predilections to bear on the problem.

Some scholars on the other hand, favor a panel precisely because it alters these relationships among themselves, attorneys' and the judge.

> The panel is a good idea because it makes social scientists responsible to the court (judge) rather than the parties (lawyers). That is how it should be.

> The panel is superior. Adversarial encounters do not avail themselves to a full discussion of either the issues or the implications of the issue. In court the interaction is tightly circumscribed within the rules of evidence. Experts can't expand on their answers.

These comments from attorneys and experts reflect the ways in which panels help move witnesses out of attorney's sphere of control, and toward more independent and direct contact with the judge. Within such settings, a judge can be more active with witnesses, searching out new kinds of information, and broadening his perspective on the case and the issues. He can direct experts to examine issues not suggested by parties and their attorneys and may otherwise act in ways consistent with the public law model of judicial behavior.[3]

Freed from the attorney-controlled confines of the adversarial process, scientists may not be limited to the narrow definition of issues required by the private law model of adjudication. For instance, several of the experts on the Los Angeles panel filed reports to the court discussing the desirability of a metropolitan plan for school desegregation. The basic argument was that the demographic composition of the city prohibited meaningful desegregation (defined in terms of racial mix) unless the pool of predominantly white children living in the suburbs was involved. However, the legal issues in the case did not include metropolitan desegregation, no attorneys for either party had advocated it, and under prevailing models of witnessing and dispute settlement such a discussion could not have surfaced. Thus one of the primary arguments for panels is that they might be more successful in overcoming the evidentiary limitations imposed by the attorneys in an adversarial system. Defense and plaintiff experts appear to be in agreement on this issue, and on the panel's promise for reducing the one-sided nature of testimony with a more dispassionate and objective body of evidence.[4] And at least some attorneys agree.

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[2] Not completely of course. The judge controls the courtroom ultimately. But what is at stake here is control of what judges will hear from witnesses, and when and how they will hear it.

[3] See our discussion, and Chayes' comments on the judge's role, in chapters 2 and 9.

> The nice thing about the experts was they were very refreshing. Nobody in the case wanted to talk about metropolitan. I think everybody had a different reason. I think one of the reasons that a lot of lawyers are just exhausted by the case and the judge is exhausted and the thought of another 10 years of litigation, nobody just wanted to deal with it. The experts didn't have that view, and they said there is only really one way to desegregate this area and that is through a metropolitan plan. Now whether it was practical or reasonable or feasible. . . I saw a simulation of costs for the bussing of 800,000 kids a day. But I guess if you are talking about the ascertainment of truth, there is a definite and distinct advantage in this case by having those experts. They pointed to something that no one else would have pointed to and that was that you should have a metropolitan plan and you should't implement any of these other plans because that is what you need. And if these witnesses had testified for a party it is likely they would not have come out with that.

The position taken by this attorney, and by others like him, lead to consideration of the most surprising finding in Table 14.1; nearly half the lawyers support a panel at remedy. Control of the courtroom process, favored by almost all attorneys, must not be the only issue at stake. What else is happening?

Style of Dispute Settlement

For many lawyers, a central consideration in whether or not to support panels is their view of the nature of the school desegregation cases and their amenability to judicial remedy. As one attorney noted:

> Well the basic question is whether or not this kind of case is justiciable at all. . . is really subject to courtroom determination.

To examine this question we must review how courts may decide these cases, and how adequate different styles of controversy settlement are for school cases.

In Chapers 2 and 9 we indicated that the normal means of resolving legal disputes in American courts utilized a private law model of adjudication (Chayes, 1976). A limited set of legal issues are defined, and are contested between two clearly defined parties. The outcome of the contest is expected to be a clear victory for one or the other party. George Simmel captured this Western mode dispute settlement nearly one hundred years ago:

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[4] We analyzed experts' views of panels in terms of their party affiliation; there were no significant differences or trends distinguishing defense and plaintiff witnesses in this regard.

> For legal conflict has an object, and the struggle can be satisfactorily terminated through the voluntary concession of that object. . . In respect to the form of conflict, however, legal quarrel is indeed absolute. That is, on both sides the claims are put through with pure objectivity and with all means that are permitted; the conflict is not deflected or attenuated by any personal or in any other sense extraneous circumstances. Legal conflict is pure conflict in as much as nothing enters its whole action which does not belong to the conflict as such and serve its purpose (1955:36).

The private law model of issue adjudication is not the only way to settle a dispute. In fact, legal anthropologists have revealed that many societies rarely resolve disputes in this way (Nader, 1969; Fallers, 1969; Bohannan, 1967). Tribal societies often employ a method of dispute settlement which in some respects is the opposite.[5] The outcome of the case is not based upon a narrow legally defined set of issues, nor is the realm of relevance circumscribed by a set of formal legal rules. Rather, the parties bring forth evidence and testimony about a broad range of issues in an attempt to achieve a compromise between the parties, and within the community, about what should be done. The aim is to settle the dispute by some compromise, rather than to declare a winner and a loser; and everything pertaining to the relationship of the parties is relevant in the determination of that compromise.

The choice of a style of dispute resolution is partly determined by the nature of a society's legal culture, but it may be more or less appropriate depending upon the nature of the controversy in question. In general, it seems that when the parties have an ongoing relationship, and when they are tied together on various levels (e.g. economically, politically, religiously, through kinship or common neighborhood), the private law model may be less effective.[6] Disputes between such parties tend to be polycentric in nature, involving a set of cross-cutting conflicts, the resolution of any one of which influences the other conflicts. This set of conflicts is not easily captured by a winner-take-all rule system which declares the winner and loser on narrowly defined legal criteria.

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[5] This style of dispute resolution is found not only in other cultures. The juvenile court movement in the United States in the early part of this century was an attempt to impose a similar system. Ideally the determination of delinquency was not to be a finding of guilt, but only a civil status which would allow the state to assist a child. The evidence in a juvenile court hearing was not to be restricted to information concerning an alleged violation of law. Rather, it was to completely open, investigating the whole background of the child. The outcome, at least in theory, was to be a compromise (whatever was in the best interests of the child) based on a wide ranging set of evidence.

[6] The private law model is most likely to be effective then, when the relationships among the parties are episodic and only involving the temporary issue at hand.

When lawyers suggest that school desegregation cases are not justicable, they implicitly are arguing that such disputes are difficult to resolve within a private law model. Consider the following comments:

> It is not every problem that can be solved by courts. Courts are ill-equipped to solve this kind of problem. The courts are not by and large institutions that remediate situations. They just say you are right, you are wrong.
>
> In this type of case we are getting far beyond the use of courts as a method of resolving disputes. Desegregating whole school systems is not the type of things courts traditionally get into. You are having courts make decisions based upon their own sociological concepts. . .

Settling who is "right" and who is "wrong" is not enough in these attorneys' views. After all, at a local school level, the parties are in a complex and enduring relationship. The school board and school administration must continue to deal with parents and children who bring in litigation, and vice versa. The "legal issues" at stake, moreover, focus on the nature of the historic and future relationship between the parties. Schools are a central element of community identification and solidarity, and parents and students are an important part of the school. At a still more macro level, the character of the entire community, including its business and residential climate, is affected by the nature and quality of its schools. In addition, many people and groups affected by the dispute are not represented by the parties to the suit. The nature of the relations between plaintiffs and defendants in school cases make it a public controversy, often moving the court towards a public law model of adjudication.

What alternatives do parties and courts have when confronted with this situation? Macaulay notes that businessmen who engage in contractual relationships with one another over long periods of time often avoid the courts (1963). Out-of-court settlements allow the parties to consider any issues they deem to be relevant, regardless of their legal significance. And such settlements allow the parties to reach compromises which may involve a number of issues at once. Some lawyers in the desegregation cases, too, might prefer a compromise.

> I would much rather have sat down with the plaintiffs. . . and try to negotiate outside the system.

However, out-of-court settlements are remarkably rare in the school desegregation cases. For the defendant school board, any attempted compromise may have serious political consequences. Frequently, the board has been elected in part as a backlash to previous school boards which have moved toward desegregation. If the board is of a more liberal bent, it may prefer that the court, not the board, take the brunt of community anger regarding a desegregation plan (Kalodner and Fishman, 1978). Where local plaintiffs have attempted to settle cases (Atlanta, St. Louis), national plaintiffs (the National NAACP) on occasion have attempted to prevent this outcome. The national plaintiffs' refusal to settle apparently is based upon a desire to play for rules in the legal process (Galanter, 1974), and their concern that a compromise settlement in one city will make victory in other cases more difficult. Thus, for a variety of reasons, some having to do with long range political precedent, and others having to do with short range political survival, neither side may wish to negotiate or settle outside of the adversarial courtroom process.

There are many themes involved in a more integrative, or public law model of dispute settlement. But one obvious element is the movement away from adversarialness in all aspects of court procedure: e.g., the movement away from party witnessing to a panel of witnesses representing no single interest and able to deal with a variety of cross-cutting concerns and loyalties. The panel, untied to parties, may be able to alter or broaden the range of issues in dispute, and therefore the nature of remedies possible. Panels can introduce new evidence or issues that increase the possibility of compromise, away from the win - lose emphasis of the more highly partisan tradition.

Almost all attorneys we interviewed, however, express misgivings of panels at the violation stage of litigation. Their position stems from a general belief that when a constitutional right is at stake a party either has a right or (s)he does not. There should be no compromise.[7] The following quote sums up this view:

> I think most such panels are eunuchs. You end up with a political compromise solution to what is a Constitutional issue.

At the remedy stage, however, many lawyers and social science experts are much more amenable to panels. In the words of one attorney:

> The evolution of the law is such that it is not altogether clear whether or not you're dealing with some social injustice or a constitutional violation. I think that a panel of experts is really essentially an accomodation of the political process. I think to some extent it involves the court mimicing or setting up sort of a mini-legislature to deal with an issue that probably ought to be dealt with in the real legislature to begin with. Really, I have a feeling that those panels really perform a function more suggestive of what the community will accept, rather than giving any better idea of what's right and what's wrong.

As this attorney implies, it is at the remedy stage that a workable plan must be developed and implemented. To be viable, such a plan must recognize and respond to the complex and enduring relationship between parties. And such a plan, to

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[7] Some early critiques of Brown were along similar lines, that the Supreme Court's adoption of the "all deliberate speed" standard for desegregation was an impermissable compromise with a constitutional right. If the plaintiffs had a right to a desegregated education, they had the right immediately, not some years later as the political problems of white resistance were worked out.

work, must gain the more or less willing support of opposing parties. Once the trial is over, minority and white groups, parents, students and educators must be re-integrated and able to work together.

Table 14.1 indicated that approximately half the attorneys supported a panel at remedy. Which lawyers do and which don't? How can we explain the difference in attorneys' views? Table 14.2 indicates that plaintiff lawyers are more accepting of panels than defense lawyers. In Chapter 9, we argued that plaintiff attorneys were more likely to adopt a public law view of the desegregation cases than defense attorneys. Their concerns about constructing the community context in which segregation occurs, and about enlightening or converting the judge, moves them in this direction. Moreover, the plaintiffs may have more interest in constructing a viable remedy *during* the trial than does the defense. The defense, after all, represents the school board and its professional staff, who have been operating and managing the school system. Judges usually consider them to have the expertise and experience to create or to manage a desegregation plan, once ordered.[8] If the plaintiffs wish to have much control over the eventual plan, to introduce expertise of their own, they stand a better chance of doing it during the trial, before a remedy is announced. Thus, to the extent that a scientific panel helps take the remedy out of the hands of school people, and places it in the hands of experts operating within the judge's purview, it may seem more attractive to plaintiff attorneys.

However, even though it is understandable why plaintiff attorneys support panels more than do defense attorneys, not all do so. And, as we indicated previously, some scholars oppose a panel as well. The issues of power, and preferred style of dispute settlement, still leave some themes untouched. Many of the social scientists and lawyers who oppose panels do so partly because they doubt the ability of most scholars to present a "complete account of existing evidence (or lack thereof)" and their ability or willingness to "render a balanced appraisal of the substance, validity and reliability of the current evidence." Thus, the third issue surrounding panels is the nature of the scholarly role and testimony itself.

The nature and role of expert witnesses

The third issue that seems to lie at the root of actors' views of a panel is their conception of what experts really are like. Are they neutral and objective?

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[8] Whether they actually have such expertise, or are willing to use it in the service of desegregation, is a good question. Recent history is quite mixed on this point, and we discuss some of the relevant issues in Chapters 1 and 15. In Chapter 15 we also discuss other problems majority and minority, and citizen and professional, groups face in working together to implement a court order.

Table 14.2

Attorneys' Views of an Expert Panel at Remedy, by Party*

Views of an Expert Panel	Plaintiff (N=19)	Defense (N=18)
Approve	12	6
Disapprove	7	12
Total	19	18

$\chi^2 = 5.82$, df = 1, $p. < .05$

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*Since only 3 attorneys were undecided, they were omitted from this table and the analysis.

Could they be (more so), were they removed from the adversarial pressures of party witnessing? Or, are they inevitably biased and adversarial? These questions about the nature of scholarly roles and testimony are relevant to the consideration of a pane in two ways. First, if scientists individually can be free of bias then a panel is more attractive to all parties: if not, attorneys need to be present to protect their party's interests and to publicize bias so it will not inappropriately influence the outcome.[9] Second, if science in general can be value-free a representative panel can be selected; if science as a collective enterprise is biased, any selection process can create a "loaded" panel.

Clearly there is a variation among all observers on these matters, but several general observations lead many experts and lawyers to conclude that the notion of a completely unbiased panel may be a fantasy. First, many lawyers in these cases feel the social sciences are "soft", and do not lend themselves to the precise statements which are possible in the natural sciences. One suspects that this perception is one which lawyers share with many judges, and with others in the society. As Strong (1970) notes, however, similar critiques have been made against "harder" sciences as well.

Second, and more importantly, "softness" depends on the question. In both the social and natural sciences there are some questions which have precise answers and there are some questions for which the best available answer is but an estimate about which professionals may disagree. A number of lawyers and social scientists believe that in the area of desegregation, not only are there few precise answers, but the issues themselves are of such political and emotional importance that almost everyone has strong feelings and underlying value positions. As one lawyer notes:

> We seek to imbue any professional with the idea that they are non-human philosopher kings who have made an intuitive leap to the knowledge of the good. That itself contains a fallacy. When you get into subjects like race, obscenity, things that have an emotional overload in this society, the perception of either side of expertise does tend to get skewed. What the reality is, is a very difficult thing to say.

Nor do social scientists inevitably feel they are above the fray. As one expert admits:

> Particularly in the area of a volatile social issue, such as race relations, the potential exists for the involvement of ideological positions in the findings of social scientists.

While it is not worthwhile to engage in a debate about whether any social science can be totally value-free, most scientists since Weber would say no

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[9] In this regard, see especially, Cahn's concerns about the responsibility of cross-examining attorneys to hold experts accountable to truth (1956; and Chapter 12 of this report).

(Weber, 1946:129-156). There are, however, matters of degree: the study of race relations by American academics would seem to be an area where neutrality is particularly difficult. As one piece of evidence, academic work in this area frequently is fraught with ad hominum attacks between scholars and implicit or explicit assaults upon the politics and integrity of the work of others.[10] As a result, it is reasonable to assume that desegregation is one of the areas of academic inquiry where scholars hold strong opinions that might influence their performance as experts - as party witnesses or panelists.

The second major problem in bias does not involve individual scholars' ability to approach or attain neutrality; it concerns the collective bias of the profession. In Chapter 8 we discussed various scholars' views on similar questions. If there is a collective bias toward pro-desegregation positions in the social scientific community, this tendency will have impact upon the kinds of people available for and selected to a panel. For instance, several scholars and attorneys, typically those associated with defense parties, contend that panels are not selected to represent the range of scholarly views about desegregation. Instead liberal biases within the academic community, and within portions of the judiciary, may lead to non-representative pro-desegregation panels.[11]

> And in the case of the L.A. panel, there's no question that the judge did not make an attempt to get a representative cross-section of opinion. In fact, not only that. He got a panel from among the most activist pro-desegregation people in our field. Now you say is that necessary? Well maybe not, but by making the judge appoint the panels there's danger of one person appointing a panel that's very one-sided.

If this could happen on a pro-desegregation basis in Los Angeles, it could happen on an anti-desegregation basis in another case. Either way, biases in the selection process may place panels in a partisan and adversarial context from the onset. Thus, the vicissitudes of selection and the problems of bias cause some attorneys and experts to reject panels because of their failure to attain (or approximate) the value-free ideal.

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[10] In Chapter 4, we discussed some of the problems of partisanship in applied social science, and in Chapters 3, 6 and 8 we discussed these intra-academic issues in more detail.

[11] The perception of such bias may be an additional factor explaining greater plaintiff attorney support for panels, as reported in Table 14.2. If "their side" is seen as having an edge in terms of potential panel members, it makes sense for more plaintiff attorneys to support the idea of a panel.

Several scholars who perceive conflict and bias in their profession, and who therefore express deep concerns about a panel that might give license to such bias or open room for such conflict, argue as follows:

> The panel sounds a little odd to me because it sounds like an effort at dispassionate social science. But I know those people and I know that they are not dispassionate.
>
> It think it is unrealistic that you are going to get unanimity of opinion (with a panel). We do not have consensus in our field. Somehow when it comes to policy implications, we want to present a united front. Why? There isn't a united front, why should there be one in court?
>
> You tend to make them (experts on a panel) appear to be something they are not if you say they are paid by the court rather than by the plaintiffs. They are still going to have their own preconceived notions about a particular solution.

No one who supports a panel is willing to argue the opposite extreme, that social scientists really are philosopher kings, capable of conducting research and rendering opinions in a totally dispassionate manner. There are those in the academy, however, who believe a more neutral and more objective approach is possible. They often support the notion of a panel, and the compromises or cooperation that might flow from it. Moreover, they suggest mechanisms which could produce less biased panels (e.g. selecting from lists presented by both parties, permitting parties to call additional experts to rebutt panels allowing the parties to cross-examine panel members). While none of these mechanisms is fool proof, together they do provide some protection against bias.

Even with such safeguards, however, many of the lawyers and a number of the experts we interviewed do not favor a panel. They appear to absolutely prefer party testimony. For experts, this preference appears to be related to a certain view of their role in the courtroom, a view which rejects the value-free ideal and the idea that a consensus can be reached on key issues. For instance, compare the following two statements from experts.

> I think there are a lot of factual points that the witnesses from both sides of these cases could agree upon. There are a lot of things that Armor and Orfield would agree on.
>
> It (the panel) always struck me as a simple response to Eleanor Wolf, et al.'s, criticism of the adversarial pattern being inappropriate. I don't know what you would accomplish by putting Armor, Coleman, Orfield and Tauber in the same room and saying you guys come up with a (desegregation) plan. They don't start from the same premise. It basically is an adversarial process where there are different views.

For some, like the first informant, the heart of being an expert lies in a particular fact or knowledge base, and the willingness to share that base, as is, with public figures. These experts generally adopt a social science stance in court. For others like the second informant, one's general viewpoint, formed and shaped by scientific research as well as all of one's experience, is what is to be delivered.[12] Those who identify with the latter view generally adhere to legal-adversarial norms in court. They would seem to be more likely to concur with Sparshott, that a decision concerning desegregation is like many other perspectives on human interaction:

> This compound problem of the nature of man and of his world, is not a factual one but deliberative one to be settled, that is not by finding things out but by making up one's mind. There are, of course, hard facts that determine what answers to the question are admissible but it is not these facts which are in question. There are many ways in which, many aspects under which, we men can think about ourselves and about the world considered as our environment without committing detectable errors of fact. (Sparshott 1972:110-111).

Several experts adopt this point of view, as evidenced by the following quotes:

> More and more I feel that I am presenting a perspective on how to interpret reality rather than a set of hard and fast proofs.
>
> I think there are fundamental, perhaps political, perspectives of the nature of current reality. The issues have become so entwined with strong feelings about current policies that only some of the issues can be resolved by scholarly debate. Some of it is just difference of opinion and perspective.

This disagreement among social scientists about the proper role of the expert witnesses helps explain their mixed opinions about the worth of panels. An expert who believes the main message to be conveyed is a point of view is likely to be more comfortable with party witnessing and with an adversarial process. While they still may feel constrained by limits posed by legal relevance, they are not uncomfortable with the idea that they should have a point of view and that it should predominate.[13]

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[12] Those familiar with the rules of evidence concerning expert witnesses will know that one of the distinctions between expert and non-expert witnesses is that experts are permitted to give opinions, where as non-experts are by and large limited to matters of personal perception (See Federal Rules of Evidence, sections 701-702). The distinction made here, between facts and points of view is broader than the rule of opinions, per se. For instance, experts may have opinions on a fact or set of facts, e.g., the probable amount of white withdrawal or the likelihood of academic gains from desegregation. This is different from, and less extreme than, a general point of view concerning the worth of school desegregation as a national policy.

[13] One's views on these matters also may be related to the broader set of conflict and consensus paradigms about social systems (see Chapters 1 and 2). If one adopts a conflict view of local school controversies, and of the issues underlying desegregation, it is probably more important to adhere to an adversarial mode of dispute settlement. An expert panel might be able to achieve consensus only if the dispute itself is seen as amenable to a consensus-based settlement, and if social science is perceived as able to rise above the group interests and values that pervade the society at large on racial matters.

Aggregate data on normative commitment supports this line of argument In Table 14.3 we contrast support for panels by those experts who adopted a social science stance in court with those experts who elected to adhere to legal adversarial norms. The data indicate that experts following social scientific norms are substantially in favor of a panel: 85% of those expressing a preference favored it. Among scientists electing legal adversarial norms. only 50% of those with a clear opinion favored it. In fact, those scholars committed to maintaining the context of a legal adversarial system may see the panel presenting a danger, "covering" important controversies with a neutral facade. Those scholars committed to a set of social scientific norms in court may prefer a panel because it provides the conditions under which these norms can be acted out with less conflict and more control by scholars themselves.

Next, we examine the views held by scholars who had different amounts of experience testifying in court. The critical break in opinions occurs when we separate the preferences of experts who testified at least three times. At that point, 40% favor a panel procedure, while 84% of those experts with less experience favor a panel. This finding is consistent with the previous one. Indeed, part of the reason is that 56% of the repeat players (3 times or more) adhere to a legal-adversarial stance, compared to 28% of the one/two time testifiers. Thus, the table in large measure replicates the one on normative stance alone.

In Chapters 3 and 9, we noted that one consequence of twenty-five years of party witnessing has been the creation of a relatively stable set of experts who testify repeatedly in school cases, and a set of "peripheral experts" who appear in only one or two cases to "fill in the gaps" (e.g., local experts who present local data or experts who can present data on some novel or idiosyncratic aspect of a particular case). Whether by initial inclination, or later socialization and commitment, the "inner circle experts" are more likely to be committed to a party and comfortable with the adversarial nature of courtroom interactions than are the more "peripheral" witnesses.

Thus, experts who are themselves adversarial, or who see the social sciences as adversarial (partisan, non-objective), on desegregation-related issues, are more likely to prefer the party witness procedure. They do not think individual scholars, or a panel, can transcend ideology and party loyalty. Moreover, as some argued, panels even may increase the danger of partisanship by "masking" or "disguising" partisan and biased knowledge as objective science. Experts who themselves adhere to social science norms, and who feel others can transcend their biases if removed from adversarial courtroom procedures, are more likely to prefer the panel procedure!

Table 14.3

Scientists' Views of an Expert Panel at Remedy by Normative Stance and Experience

	Normative Stance*			Experience** in Testimony		
	Social Scientific	Mix	Legal Adversarial	Once	Twice	Three or more
Approve	17	3	5	14	7	4
Disapprove	3	2	5	4	0	6
Undecided	4	1	8	6	1	6
Total	24	6	18	24	8	16

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*When a chi square analysis is performed with just social-science and legal adversarial stances the resultant statistic is significant at $p. < .05$ ($\chi^2 = 7.9$, $df = 2$). If the "undecideds" are excluded as well the relationship holds ($\chi^2 = 5.07$, $df = 1$, $p. < .05$).

**If the break on testimony is 1 time v more than once, there is no trend in the data. If 1 or 2 times is compared with three or more times, the χ^2 relationship is significant ($\chi^2 = 7.3$, $df = 2$, $p. < .05$).

Summary

The interviews with scholars and attorneys suggest that the choice of panel versus party witnessing involves the consideration of several issues. Appropriately enough, the relevant issues have been central to other portions of this report, and indeed to the structure of social scientific and legal institutions.

One issue, discussed previously in Chapters 11 and 12, concerns the division of power and control in the management of courtroom interactions. Social scientists' preference for a panel can be understood largely as a reaction against the adversarial process, and the resultant control by attorneys of witness examination and cross-examination. Scholars frequently argue that they could work more effectively, and that their science could flourish better, if they were freed from the constraints of the adversarial system. Lawyers, more often than scientists, preferred to stay with party witnesses procedures, and to maintain their control of testimony and expert-judge interactions.

Surprisingly, a large number of lawyers also were willing to try a panel procedure, at least at the remedy state of litigation. As discussed in Chapters 2 and 9, some lawyers question the appropriateness of a private law model for the adjudication of school desegregation cases. Along with many scholars, these lawyers would prefer a dispute settlement procedure that gives more attention to a broader range of evidence and to the ongoing relationships among parties to a suit. For these informants, panels are a step in the direction of a public law model, and a mediative process for dispute settlement.

Other lawyers and experts consider another theme in evaluation of the panel procedure-bias and partisanship in social science itself. Many scholars favor a panel because they believe it reduces partisan pressures and frees social scientists to be relatively unbiased. Other scholars, and many lawyers, reject the panel because they are concered with the potential biases of social scientists. If a panel includes scientists with only a narrow range of views, it is even more problemmatic to exclude attorneys from an opportunity to check or correct their biases. As a result of these interacting issues, an adversarial style of litigation, matched by an adversarial style of social science, was prefered by some experts as well as some lawyers.

CHAPTER 15:

CONCLUSIONS: PROBLEMS OF IMPLEMENTING COURT ORDERS (ANYWAY)

Our exploration of the use of social scientific evidence in court decisions on school desegregation has unearthed many interesting patterns and issues. However, some of the most important and useful research seldom has been introduced in court, and seldom has been utilized in the creation of plans and remedies. As we noted in Chapter 3, research on how desegregation can be made to work best, and how educational systems can organize for change (at classroom, school and district levels), obviously is relevant for effective implementation efforts. Its exclusion from court analyses and decisions must, therefore, hinder attempts at meaningful racial change in schools. Moreover, the exclusion of research of this sort in general is consistent with the judiciary's lack of attention to a variety of problems in implementing desegregation court orders. What's the use of a good order (anyway), if it isn't implemented positively and effectively?

America's history with school desegregation efforts is rife with examples of the non-implementation of judicial orders, of the failure to carry out policies of effective desegregation. America's recent history also is replete with examples of administrative rhetoric and policy about desegregation that is never translated into effective programs at the local school and classroom levels. At the same time, there are some examples of truly innovative and effective programs. What makes the difference? Why are some judicial decisions made with a concern for implementing change and others are not? Why are some judicial decisions implemented and others not?

Problems in Implementing Court-Ordered Desegregation

The implementation process is not the same as the policy-making or decision-making process. Thus, the legal and scientific issues involved in implementing judicial orders are quite different from those involved in deciding on the violation and remedy, per se. Since they are deeply intertwined, however, the failure to plan for decision-making and implementation together often results in substantial departures from the vision established in a court-ordered policy. In fact, since the critical behaviors or activities impacting upon lower-level educators, and consumers and clients of schools, occur during implementation, some scholars suggest that the most relevant issues in change occur there.

> There are many contexts in which the latitude of those charged with carrying out policy is so substantial that studies of implementation should be turned on their head. In these cases, policy is effectively

'made' by the people who implement it (Lipsky, in Pressman & Wildavsky, 1973: 174).

Thus the literature that studies only desegregation decision-making by judges and senior school executives may be studying chimerical phenomena, abstract and distal events which do not always touch the lives of ordinary people who must carry out decisions, or for whom the decisions were intended. Likewise, however, the literature which only studies policy implementation at subordinate levels (like research on classrooms) may lose sight of the ways issues and options are predetermined by policies made at higher levels. Neither focus is entirely sufficient by itself.

Consistent with mechanical theories of jurisprudence, judges and legal observers often created mechanical assumptions about implementation: they often assumed that those affected by court decisions immediately would comply with these lawful orders and rulings. However, decades of school and community response to the desegregation cases provide substantial contrary evidence. Moreover, recent research has clarified the importance of interest group conflicts in explaining resistance to change and to compliance with judicial orders. Various actors' values or policy preferences, and the organizational roles and structures in which they are embedded, may affect why, how and when some authoritative policy decisions gain compliance and commitment and others do not. Part of what is problematic in understanding how social systems generate compliance with lawful orders of authorities is that simple compliance or non-compliance is not an adequate frame of analysis. Studies by Dolbeare and Hammond (1971), and Rodgers and Bullock (1972) indicate that there may be a wide variety of responses to judicial orders, ranging from firm commitment to program objectives, to lackadasical carrying out of orders, to blind obedience without questions, to subtle and even overt forms of resistance.[1]

What has happened to court orders requiring school systems to plan for implementation of effective desegregation? In some cases, a plan was developed and implemented rather fully. In other cases, the school system directly appealed the judicial order, and or the plan embodied in that order, and further court action was required before a plan was developed and implemented. In still other cases, token action or an inadequate plan was developed by the school system, and sooner or later the plaintiff parties took the school leadership back into court for further redress. In several cities, one result of a court order was the school system's establishment of a citizen panel or other participatory mechanism. This broad panel was entrusted with the responsibility of drawing up a plan, and then providing for its implementation. The use of citizen panels, town meetings or other advisory groups resulted primarily from judicial decisions that were without clear plans, but that required the school system to come up with their own. In reviewing the early history of school desegregation cases in the South, for instance, Steamer noted:

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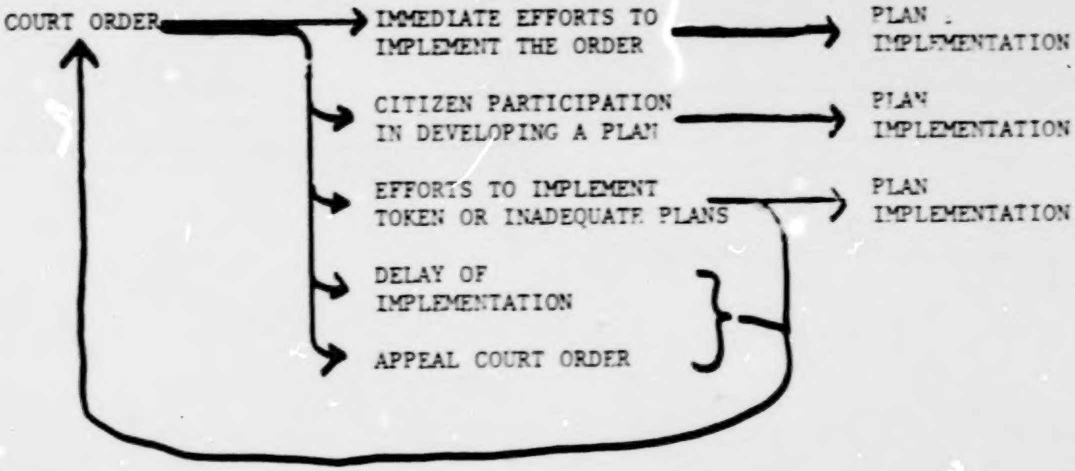
[1] Several studies of the implementation of authoritative decisions in bureaucratic organizations generate a similar set of responses. See Merton (1940), and especially March and Simon (1958), for a discussion of the dysfunctional aspects of each of these adaptations.

> In the matter of formulating plans for desegregation, the district courts have exhibited a great diversity in according weight to the administrative factors enumerated in the BROWN decree. The lower courts have held, for example, that a prompt and reasonable start has been made if the school board has been studying and planning, or even if a citizen's committee has been appointed to study, the problems of desegregation. The time allowed shool boards to prepare for desegregation has varied all the ways from 6 months to an indefinite period. Some district courts have ordered desegregation generally but have set no time limit; such orders have resulted in no beginning whatever (1960:429).

Figure 15.1 illustrates these different paths to implementation that occurred subsequent to court orders in 30 desegregation cases during the 1960's and 1970's.

Figure 15.1[2]

From court order to implementation of an effective desegregation plan


COURT ORDER
IMMEDIATE EFFORTS TO IMPLEMENT THE ORDER
PLAN IMPLEMENTATION
CITIZEN PARTICIPATION IN DEVELOPING A PLAN
PLAN IMPLEMENTATION
EFFORTS TO IMPLEMENT TOKEN OR INADEQUATE PLANS
PLAN IMPLEMENTATION
DELAY OF IMPLEMENTATION
APPEAL COURT ORDER

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[2] This diagram comes from our analysis of case studies published by the U.S. Commission on Civil Rights; other portions of this analysis were reported in Chapter 1 (Rothenberg & Chesler, 1980).

Faced with growing awareness of the problems of implementation, judges have undertaken a wide range of responses. Nakamura and Smallwood (1980) compare, for example, the level of concern for implementation reflected in the orders of Judge Weigel in San Francisco and Judge Garrity in Boston. According to their quote of Kirp's report, Judge Weigel:

> Left implementation in the hands of those formally charged with the responsibility for running the school system (1980:99).

Judge Garrity, in contrast, dealt with overt resistance by creating a special Department of Implementation in the Boston school system, and made that department directly accountable to himself:

> In effect, Judge Garrity and his appointees became both the desegregation policy-makers and the implementers for the Boston schools (1980:100).

Judge Garrity himself did not become the implementor. But his order(s) specified implementation roles and programs, indicated his concern that these programs be carried out, and his intent to monitor these processes. Judge Weigel's order did not specify implementation programs or roles.[3]

Some observers have suggested that leaving the responsibility for altering the segregated school system in the hands of school officials is like "putting the foxes back in charge of the chicken coop" (Monti, 1979). Others have noted that there are limits to the use of judicial authority to intrude on legitimate professional expertise and prerogatives, and that the responsiblity for plan development and implementation should remain in the hands of school system professionals. Several judges' comments reflect their attempts to wrestle with this problem; in general, they are reluctant to take on too much power.

> I believe that if I could get this case, the remedy of this case, past the political people on the school board, to the professionals over there, they could do just as good a job as a bunch of professionals I could hire. They know the system well, and I still believe that they're good people: I don't think they're all wicked. That was my point. I wanted the least possible intrusion, and to get this thing down to the people that can make it work. I didn't want to actually hire some people to take over the school system. I would rather see them screw it up themselves a little bit, than for me to do that.
>
> My commitment, within the confines of this office, is to make the least intrusion into the affairs of the board of education. It is their obligation to run the school system, even misrun the school system, as long as the Constitution of the U.S. is complied with. So I didn't want to get into their areas, even in some areas where I thought they were dead wrong.

One of the problems judges face in dealing with the difficulties of implementing desegregation is that there often is not a great deal of community support for new policies. Moreover, the judiciary may receive little support from the other branches of government. Several judges noted, in fact, that school desegregation was a judicial issue because of default by other dispute-settlement agencies and bodies throughout the society.

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[3] There are many variables that may contribute to these differences, some of which do not rest on the judge's ideology or approach alone. Characteristics of the local community, prior evidence of administrative resistance or incompetence, or clarity and good will, etc., all may impact on a judge's decision in this regard.

> I think there are limits to what any court can do in solving all the social problems. I think that any of us involved can take pride in the fact that in essence there was a constitutional revolution and the courts made it possible without it being a violent revolution. My own theory is that the executive and legislative branches, both federal and state, absolutely failed. Somebody had to do something, and this is what pulled us out of our traditional role.
>
> If the Congress or State legislature, or if Governors or Presidents, had stepped out in front and done something, the courts might not have gotten all chopped up like this.
>
> The Congress could have passed laws desegregating schools. The Congress has the right to pass civil rights laws, but the courts should not have moved into these areas on their own, based upon some social theory of experts.

Thus, judges may feel isolated, and perhaps "out on a limb," in their desegregation rulings.

Even when they did have support, the choices judges faced were not easy to resolve. On the one hand, most judges have a commitment to dismantling what they see as racial discrimination and illegal segregation in schools. On the other hand, they are committed to the maintenance of separations between the various branches of government, and to behavior in accord with the knowledge that the judiciary is not an elected representative of the people. The commitments to popular democracy and to constitutionally guaranteed civil rights often come into conflict where judicial action must counter resistance by the populace or its elected representatives. As Stinchcombe and Taylor have noted with regard to the Boston case:

> The problem with governing stably once the issue has escalated to this proportion is that the judiciary is badly set up for administering a school system, and in many ways badly set up even to make policy for a school system. Further, the fundamental illegitimacy of non-democratic administration of a central function of government prevents the judiciary from taking over the function of running the school system (1980:81).

In the face of this conflict, many judges, in creating their court orders, simply have backed away from "intruding", or from doing what Congress "should have done." Even when judges moved forward to ensure implementation of their orders, this ambivalence accompanied their actions.

Characteristics of desegregation policy and policy-making authority

The quality and degree of implementation is strongly influenced by certain characteristics of the policy decision--the court order. Sabatier and Mazmanian

(1979), Hargrove (1976) and Van Horn and Van Meter (1977) summarize the findings of many other scholars in indicating the following aspects of a policy or decision that a likely to affect its implementation potential.

> clarity of the policy decision or court order. . . clarity about who is affected, who is responsible for action, and what specific changes are expected will increase the likelihood of effective implementation
>
> resources and incentives for all actors in the implementation process will increase the likelihood of effective implementation
>
> provisions for monitoring and for sanctioning non-compliance will increase the likelihood of effective implementation
>
> incrementalness rather than drastic changes will increase the likelihood of implementations
>
> extensiveness or specificity of the order in determining remedy will increase the likelihood of implementation

In establishing or clarifying public policy with regard to desegregation, policy makers often have disagreed about what ought to be done in general, let alone in specific school systems. The Supreme Court has disagreed, both internally and with various Appellate and District Courts. As Johnson has noted with regard to the school prayer rulings, "a dissenting opinion. . . can exist as a symbol to legitimize one's position, and it may be dysfunctional as far as stimulation of compliant behavior and attitude change is concerned" (1967:56). Disagreement over national and local policy has occurred not only within the judicial system, but also between the judiciary and the national legislature. Periodically, the executive and the legislative branches have used their power over the appointment of judges and the allocation of funds for school bussing to influence the outcomes of these battles.

Even if all actors agreed to support desegregation, it is not clear they could agree on what that means. Some form of desegregation has been our national policy since 1954, and for the most part the courts have tried to help school systems implement such programs on the local level. But early in the litigation process, some scholars and officials stressed the need to move beyond a concern for physical desegregation, per se, and to establish as a guide for policy the concept of "integration" or "quality interracial education" or "effective desegregation". These secondary symbols all focus on the problems of implementation once legal or residential barriers to interracial education have been removed. However, all these terms remain ambiguous, certainly more ambiguous than illegal segregation or racial balance (terms which have not been so clear over the years either).

Thus, it should be no surprise that different judges clearly had different notions of what was at stake in the desegregation cases - physical desegregation or quality interracial education, or something in between. As a result, they were solving different problems with their different remedies. For instance, one judge we spoke with indicated that:

> The function of an integration case is to make certain, I think, that the district treats its children equally, period. That is, all of them. And whether they fail academically or whether they don't is something that I am not to be concerned about.

Other judges were quite concerned with the quality of the education being delivered in the school system, or "whether they fail academically or whether they don't."

> There could have been another direction of the law in terms of equal protection, and that would be to make damn sure that schools work. I've had on the stand black witnesses who testify, "Judge don't worry about the percentages, just make our school a good one." That was really what I was there for at that point in time.

Still others adopted an even more "activist" frame, setting this dispute over desegregation in a broader context of school system issues and resources.

> I also felt that I would be able to make this an opportunity to make some changes in the way we do things. I wanted to try to get some money and do things that will help the kids.

In addition to the difficult problems of deciding "what was at stake", judges faced the question of how to implement their decision once it was made. In most cases throughout the country, and certainly in the cases we studied, the authoritative decision or policy regarding desegregation was made by a judge in the form of a court order.[4] Initially, and eventually, that order was prepared by a Federal District Court Judge, although it may have traveled through several appellate courts on its way. For a variety of reasons, judicial authority has its own special problems with implementation of change.[5]

One issue, of course, is the problems created by the win - lose private law model of adjudication. If the court process has encouraged parties to engage in a highly-adversarial endeavor, how do they establish cooperative relations afterwards? In this context, many judges were concerned about the "bad fit" between these multi-party conflicts and traditional models of dispute settlement. Those judges who adopted a more structural view of the case, and who were concerned about more than equal access, often indicated that the dispute settlement model they often were forced to work within was not particularly useful in these widespread community controversies. Several indicated a preference for some sort of mediative procedure, perhaps something like the remedy panel discussed in Chapter 14.[6]

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[4] That is to say, seldom were communities able to settle these controversies "out of court", without litigation culminating in a judicial decision. While the reasons for this community dynamic may be multiple, in Chaper 14 we suggest some possibilities.

[5] There are several studies available regarding the implementation of legislative and judicial policy at a national or regional level, but relatively few studies of the implementation of judicial decisions at the local level. Some relevant local studies include those focusing on the school prayer decisions (Dolbeare & Hammond, 1971; Johnson, 1967), police treatment of suspects (Baum, 1978), as well as school desegregation (Rodgers & Bullock, 1972; Bullock, 1980; Dentler, 1978).

> Social problems sometimes don't fit into the rhetoric or procedures of courts. Mediation was a good way to handle these cases, it provided more flexibility and freedom from the rules of evidence.
>
> The system just wasn't fitted to the problem, because a true adversarial situation would just inflame from both sides if you let it get out of hand. We effectively became administrators. . . and I'm not sure judges are very good administrators.
>
> I had hoped we could settle the matter in some way or at least remove the advocacy aspect of it, move the bitterness out of it, and so I suggested the use of monitors.
>
> We had to look for practical solutions rather than legalistic rulings.

One specific example of the use of such options is provided by Richardson and Vines, who discuss the utility of a pretrial conference as follows:

> The informal nature of the proceedings gives, moreover, ample scope for the expression of different decision making orientations. In addition, the district judge is afforded the opportunity of making a final decision, and, because the decision is not formally noted and the proceeding not recorded in the usual way, to take the decision out of the apellate process and end matters. An outstanding example of this usage may be observed in the activities of Judge Skelly Wright. . . who used the pretrial conference as a channel for his own variety of 'judicial activism.' (1970:68).

Even when decisions are made in accordance with more integrative styles of dispute settlement, compliance with judicial orders requiring desegregation is complicated by several other factors. From the court, decisions must pass through multiple layers of the local educational bureaucracy, from the school board to the local superintendent, to central office staffs, to principals, to teachers, to its final impact on students. At each step the decision may be reinterpreted and modified. Furthermore, the number of steps in this command system blur the responsibility for carrying out the court's orders. According to Nakamura and Smallwood:

> When the court decisions should affect the behavior of large numbers of people who are not direct parties to a case, there still can be uncertainty about which other actors should obey the decisions. Since the court's communication with these parties is not direct, there are opportunities for these parties to misperceive or selectively perceive their newly formulated legal obligations (1980: 93).

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[6] As indicated in that chapter, and as the following judges' comments suggest, that approach does try to create new kinds of relations among adversaries, and new kinds of roles for judges. These aspects of public law adjudication are discussed in Chapters 2 and 9 as well.

When courts (maybe mistakenly) assume a high reservoir of law abidingness in the community, they seldom are prepared to be agressive in the following up their decisions by monitoring or enforcing compliance at the local level. The hesitancy may well be related to the issues just discussed, to preservation of the limits on judicial power. At the same time, however, it may reflect an underestimation of educational and community resistance to change in racial patterns. As Von Euler has noted:

> The present Supreme Court does not see America as a land of pervasive racism. On the contrary, the Court seems to believe that legal developments since Brown and the passage of the Civil Rights Acts of the 1960's have eliminated most discrimination from American society. We are merely left with some residual effects of discrimination in the dim past (1977:298).

In Chapters 1 and 2 (and elsewhere, Chesler, 1976), we depicted this orientation as representing a consensus and individualistic view of the society, and of the nature of racial relations. At the violation stage of court action, as von Euler discusses, this stance requires plaintiffs and their social scientist witnesses to document with care the possible intents and discrete acts of public officials. At the remedy stage of court action, it permits judges to order remedies without assuming the need to follow up on them, to continue to assume most people will act to counter historic racism and discrimination. Other judges, regardless of their ideology and assumptions, insist it is the plaintiff attorney's responsibility to draw non-compliance to their attention, if they are to act. In a few cases, and especially more recently, some judges have acknowledged that compliance is not automatic, and have established monitoring commissions and masters to help implement their court orders.

Johnson has developed an analytic frame that pays careful attention to the mobilization of several different forms of social power, as means of gaining compliance with judicial orders. He suggests actors will comply with judicial decisions to the extent they attribute the following powers to the judge:

> coercive power. . . the expectation of severe sanctions if compliance is not produced
> legitimate power. . . the conviction that one has a moral duty to accept the influence of an appropriate decision maker
> expert power. . . the perception that the decision-maker has superior knowledge by which policy is made.

To the extent that judges or other decisions makers are reluctant to apply sanctions (or reluctant to imply that they will apply sanctions), their coercive power is weakened. To the extent they appear to be making decisions they have no right to make (intruding on local control of schools), their legitimate power is weakened.

To the extent they appear to be making decisions on the basis of inadequate knowledge of the law or of educational fact, their expert power is weakened.

Some judges have described fairly active roles they played in gathering informal power to ensure that their decision could be implemented. As noted, most of these actions required them to engage in alternative dispute settlement procedures. Some of the judges we interviewed noted that they tried conferences and other informal sessions to try to generate a plan that school system officials and community members could "own on their own".

> We used pretty much of a conference type of thing. We would set the case down and then we issued orders, and school systems that had problems with those orders would come back to court. We'd go to a library. . . the school board and the government and the intervenors, the Legal Defense Fund, the NAACP and all of that. We'd just sit around the table and look at the statistics, at the maps. at the enrollments, all on an informal sort of basis. We really ruled as to each school system's problems in the library, and then backed off and issued an order to confirm what we had decided in conference. It was unusual in that respect, but I think it moved the thing along instead of having all the inhibitions of a courtroom context when lawyers have to show off a little bit with the formalities and legalities of it. It was designed to sort of break down the animosity between the two sides.

If face-to-face conferences or "bargaining" sessions failed, some judges used their own political savvy, to make sure a group generating an effective plan could get and maintain support for it in the school board.

If conferences failed, some judges used their own political savvy, to make sure a group generating an effective plan could get and maintain support for it in the school board.

> There had been a serious division in the school board and one reason I kept jurisdiction was that I wanted to forestall a reversal in the majority of the school board. I kind of guessed what would happen the next time around the school board election. The two who were very much opposed to me were making public statements all the time about how they'd rather be in contempt of court than have the order or decree complied with. If those two had added another two, which they tried to do, they would have had four, and they would have voted to scrap the whole plan, and I would have had more serious problems.
>
> In some instances I'm satisfied they (elected school people) took a harder line than they really believed inside of them because they couldn't afford politically to surrender, so to speak. In those instances, we invited people to go back home and tell them that they tried, but these mean old federal judges made them. Really, we did consciously ask them to do that because you could sell that.
>
> Black board members came up with a plan, too, a minority plan. And I got the administration's plan, the majority plan. I sort of picked and chose, and told them that I sort of liked some things in both plans. The last thing I was going to do was take the minority plan. I liked it better, but I wanted it to be the majority's plan. . . I wanted them to own it.

These judges reflect quite an activist posture, and a commitment to make more than a policy decision, but a context for decisions that would enhance its potential implementation.[7]

The Community and Organizational Contexts of Desegregation Implementation

Several studies have emphasized the important role of community elites in desegregation efforts, and in supporting or opposing full implementation efforts. (Fulfilling the Letter and Spirit of the Law, 1976; Crain, 1968). Most observers conclude that these persons and groups may not be very visible, but are potent nevertheless. Interestingly, at least one observer suggests that these elites may be quite vulnerable to shifting local politics, and may follow rather than lead the mobilization of public opinion on controversial school issues (Rossel, 1978).

Whatever the causal chain, the consensus of scholars appears to be that local elites are an influential force in educational policy-making, and therefore need to be dealt with in the implementation process. The school superintendent is, of course, part of and responsive to these local power structures. To the extent she can satisfy these parties, she probably can maximize her discretionary power, and have greater personal latitude as well as security. For instance, in trying to understand superintendents' lack of forthright actions in encouraging principals' and teachers' compliance with court rulings on prayer in school, Dolbeare & Hammond discovered that:

> Superintendents uniformly defended their inaction by pointing to their many important priorities and emphasizing the need to conserve their political capital for such purposes (1971:117).

With particular regard to civil rights' and desegregation issues, Rodgers and Bullock (1972) noted that local political leaders provided a series of cues to school system leaders and members of other community groups regarding their desires. In understanding why otherwise law-respecting and law-abiding influentials encouraged non-compliance with judicial orders, Rodgers & Bullock suggested the following factors:

disagreement with the law itself
personal payoff (power and prestige) gained from defying the law
need to conform and avoid conflict with friends

Whatever the political or personal interests, or reasons, for such resistance, it is bound to be a serious problem when, as Stinchcombe and Taylor state:

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[7] Some observers will decry these behaviors, of course, and suggest that these acts truly represent judicial "intrusion".

> mandatory school desegregation, is a social objective that is unevenly supported by the establishment leaders who are most interested in and most responsible for its achievement (1980:169).

If the established and traditional leadership in a community cannot or will not support such judicial orders, we have encountered a serious problem in constitutional democracy. Unless new political forces take the lead, a stalemate (whether public or overt) between the federal judiciary and local elected officials leads to paralysis, sabotage and perhaps contempt proceedings. Even if new forces arise in the local community, the ensuing struggle for civic power also is likely to delay or neutralize the judicial order. For these reasons, many judges tried to create a consensus, or some cooperative relationship, with local educational and political elites. Of course, to the extent local elite groups were involved in responding to initial challenges by pro-desegregation community groups, and made input into the process that culminated in the judicial order, their implementation roles may have been framed by their earlier experiences.[8]

In order to gain support and commitment for implementation of their findings and remedies, some judges seriously considered the effect of their actions on community elites and the public at large. The comments below reflect judges' views that much of the court action had symbolic value; it was a drama that needed to touch many people directly in order to have maximum impact.

> The first thing I wanted to do was to make sure that everybody knew as much in the community as I could possibly arrange. That's why we had all kinds of crazy arrangements for the press and I did everything that I could to make sure to get the newspapers to print the decision. Anybody who wants a copy of it, I have tons of them here I can send to them. And I tried to write it in the style that, if somebody with an 11th grade education wanted to read it, they could, with perhaps a few terms thrown in for the lawyers. And hopefully, if somebody was going to be dead-set against this thing, at least they'd have some idea of what they were against.

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[8] In Chapter 1, we discussed some of the reasons local elites may have been concerned about the course of school desegregation, and some of the roles they played in these cases. Although elite resistance occurred, it was by no means the rule. In some cities elites became members of desegregation advisory councils, tried to build public support for desegregation implementation efforts. tried to gather extra financial and organizational resources to aid the implementation efforts, and established programs (rumor hotlines, seminars) to aid in the planning process and to ward off violence.

> The social science evidence did exactly what I expected it to do. What it did was to educate the parties from the very very simplistic approach that both sides had taken in the first hearing. The people represented in the first hearing dropped out because they saw this wasn't the lawsuit that they knew. This was a very complicated lawsuit, and the younger people came in and accepted the social science implications.
>
> I want people to come to court. It's sort of a full disclosure thing. Many federal judges are rather private. Today, when a federal judge can issue orders of broad social concern, you've got to do everything you can to make those orders somewhat acceptable to the citizenry. I don't think you ought to compromise your ethical concepts, but, within your role, whatever you can do, you've got to do. I just don't believe in stuffing things down folks throats unless you have to. People will just say, "to hell with a federal judge, you're not elected".
>
> The courtroom is not necessarily the forum in which an integration case is fought. The public arena is where it is fought. The courtroom doesn't mean anything. The judge can come out with all the decrees he wants to but unless there is some understanding in the community of what the problem is, of what the possible solutions are, unless the community understands that, the judge's decree doesn't amount to a tinker's damn. Experts were extremely important in informing the community of what the case is about. It never knew what the case was about, either from listening to the board's side or from listening to the plaintiff's side. As far as they were concerned all it had to do with was bussing.

These comments, once again, reflect judges' concerns about the limited utility of the traditional model of adjudication for these cases. The judges quoted here obviously have envisioned a much more active role for themselves in the resolution of this community controversy. They are concerned with the ways in which ongoing parties relate with one another and with the judicial decision. Moreover, they do not assume a community consensus on the issue of desegregation; many of these comments reflect an understanding of elite and grass roots conflict in the community, and of the need to work with and perhaps overcome these conflicts in order to help build a new school system.

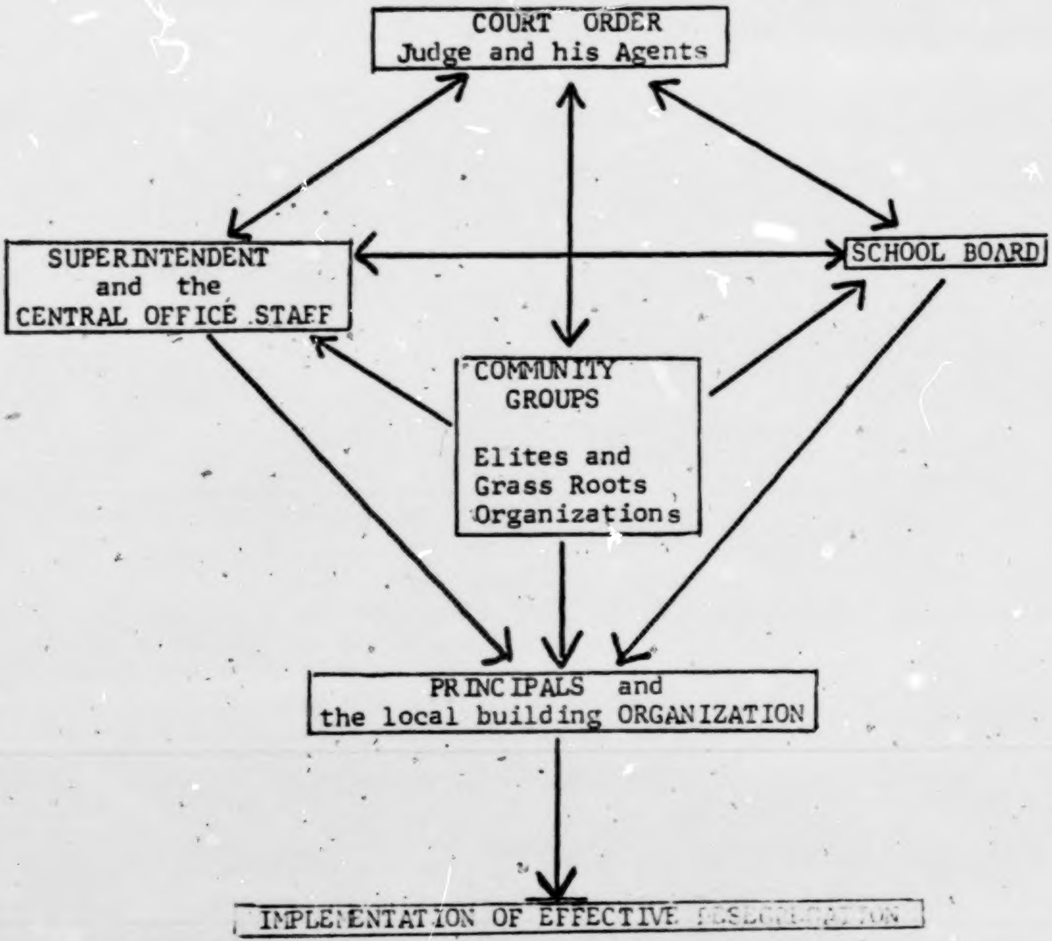
The arguments in prior chapters, and judges' comments, indicate some of the ways in which the politics of the local community, and the school board's politics, may affect the implementation of judicial orders. In Figure 15.2, we have diagrammed the relations among parties affected directly by a judicial order regarding desegregation, and who are key actors in the process of implementation. As the chart indicates, implementation begins with a court order, the end of the decision-making process. The court order usually is directed at a school board, but it requires new behaviors from school and community leaders as well. The order may vary along several dimensions: it may or may not contain specific details about the nature of desegregated education; it may or may not contain provisions for enforcement or monitoring; and it may or may not address the resources required to implement the order.

School boards' responses to this order may vary as well. As Figure 15.1 indicated, some may immediately implement the plan in a forthright and committed fashion. Others may passively implement only some portions of the plan. Some boards may appeal the decision, delay any implementation effort, or try to mobilize the community to resist. Most school boards delegate substantial responsibility for plan specification and implementation to the superintendent and her staff. These educators, varying in their commitment to desegregation policies and programs, have many options available in the way they elect to work with local school principals and teachers.

Principals and teachers working in the local school organization are responsible for implementation on a daily basis. Their values, skills, concerns about youth, and relationships with one another are core variables in understanding the impact of the court order on actual schooling events.

Figure 15.2

Key Actors/Groups in the Implementation of Effective Desegregation


COURT ORDER
Judge and his Agents
SUPERINTENDENT and the CENTRAL OFFICE STAFF
SCHOOL BOARD
COMMUNITY GROUPS
Elites and Grass Roots Organizations
PRINCIPALS and the local building ORGANIZATION
IMPLEMENTATION OF EFFECTIVE DESEGREGATION

Throughout this process, community groups of all kinds make input to the actions and concerns of all these educational agents. They link to the superintendent and the board, and as well to their friends and neighbors who are teaching and managing the schools in their community.

None of these groups or agents can implement effective school desegregation by themselves. None has sufficient power and resources, without help from others. Judges cannot force parents to stay in the school system, cannot motivate or seduce students into "enjoying" and "profiting" from school, cannot mediate the personal styles of teachers and principals that communicate messages of trust and caring to the young. Moreover, they cannot command a community to adopt anti-racist behaviors in housing and employment sectors. Principals and teachers cannot stand against community resistance, without referring to the power of the law, and the mutual responsibility of all to obey the law, or at least to avoid punishment for defiance. Educational leaders cannot direct an educational enterprise on the basis of law alone; they must translate and complement judicial decisions with meaningful theory and practice that successfully educate the young of all races within the new environments mandated by a court order. Judges, educators and citizens, all need the willing energy of many people and groups to implement their court orders effectively.

Social Science and the Effective Implementation of Desegregation

If it is clear that many court orders requiring desegregation have not been fully implemented, we are presented with several questions. One which we tried to address is: Why not? What are the constellations of forces, some within the judiciary and some within the school system and community, that create this situation? Others we turn to include: What might social science do about that? What do we know about how to implement desegregation more successfully? How can social scientists ease the move toward high quality integrated education, and facilitate the changes required to bring it about?

One of the major problems facing scientists, educators and judges considering these questions is that desegregation meant different things. and was implemented differently, in different communities. If any ten cities were under federal court orders to desegregate their schools, they complied in different ways. . . with different kinds of plans. Moreover, since they were different communities, they each had somewhat different problems to solve and different resources to call upon. Thus, different community settings and implementation tactics probably made considerable difference in the school experiences of youngsters all undergoing some kind of "desegregation". Judicial orders that didn't pay attention to these issues, plans that didn't respond to a community's uniqueness, and scientific studies that didn't conduct separate analyses for very different plans and settings, could not illuminate (or provide good guidance for) the practical aspects of implementation problems.

Despite the real and important differences existing in different school systems and communities, there are many ways in which all schools are alike and many findings which have broad applicability. Indeed, social scientific research has established some answers, or at least some beginnings of some answers, to these questions. However, the data and theories social science has generated about the conditions under which desegregated education might be implemented effectively seldom have been asked for or delivered in court. Findings regarding the nature of equal-status interracial contact and collaboration, the development and use of multi-ethnic and anti-racism curricula, organizational development or community-partnership efforts within local schools, new and vigorous leadership patterns in school staffs, and institutional change in human service systems, seldom have been introduced into court and seldom have informed court findings and subsequent remedies.

One issue that social scientists could speak to clearly is the specification of what effective desegregation means. Certainly the social science community does not speak with one voice on this matter.[9] But social scientists could speak clearly to the alternatives, presenting courts with a broader range of criteria than they currently have availed themselves of. For instance, an effective desegregation policy requires the definition of a high quality interracial learning environment, and the identification of educational and organizational mechanisms that can create and sustain this environment. By combining the theory and research of several scholars, we described in Chapter 1 a number of characteristics of effective desegregation. At th very least, that list went beyond concerns about racial mixing in schools and classrooms to deal with issues of: academic achievement, organizational fair play, positive social relations among students of different racial groups, a high level of multi-racial participation in the life of the school, and future educational and employment opportunities.

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[9] As this report indicates, it probably does not speak with one voice on any matter. There probably is no reason it should speak in consensus, given the complex and value-laden character of the issues.

In the original school desegregation cases, the findings and arguments presented by social scientists touched some of these issues, as they focused on altering those conditions creating alleged low self-esteem which minority youth developed as an apparent function of segregated schools. As later courts considered the criteria for violation and remedy decisions, student racial balance appeared to be the primary characteristic of a desegregated system. Subsequently, social scientists working with desegregation moved beyond racial balance to deal with academic achievement and, to a certain extent, racial attitudes of students. More recently, scholars have focussed attention on internal school mechanisms, and on the organizational conditions for meaningful racial change in schools.[10]

What are the internal school conditions that might make a difference? What kinds of school and classroom experiences might improve the quality of interracial education in desegregated settings? Social scientists have only recently begun to "disaggregate" large scale studies of desegregation to identify the impact of different approaches in different settings, and thus the quality of such evidence is somewhat suspect. However, some mechanisms seem to be more likely to lead to more positive outcomes than others, and some court orders have specified these implementation mechanisms:[11]

pluralistic curricula that speak to the needs of various groups of youngsters
positive teacher attitudes toward minority group members
principals who are seen by students as racially fair
classroom activities that require racial interdependence and that create equal-status racial interactions

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[10] In Chapter 3 we described briefly the sequence of social scientific studies and testimony that focussed on these issues.

[11] Certainly this is not an exhaustive list. Moreover, we have already indicated that not all these options should be attractive or useful to the same degree in different school systems. But educators and scholars (and in this as in other cases, practical educational expertise may be as good a source of wisdom as careful scientific research) have tried to identify, collect, synthesize and publicize lists of these good ideas. See, for example, some of the most recent work referred to in Chapter 4, and, especially, Crowfoot and Chesler, 1981; Forehand and Ragosta, 1976; Weinberg, 1977.

non-competitive evaluation systems
active parents' groups representing all racial groups
a local school grievance or problem-handling system
curricula that take youngsters into the community and that expose them
   to the work and social situations of different racial groups
assistance to teachers so they can spend more time in individualized
   instruction or small groups
teaching teams that are themselves interracial, and that demonstrate
   competence and positive racial relations
good working relations between local schools and future employing or
   educating systems.

Recent studies which describe these conditions and practices in detail represent the frontier of useful social science research on effective desegregation, and on practical ways of bringing about positive school environs for multiracial groups of students. Generally such studies have not been presented in court: defendants seldom presented them as evidence of their willingness to try to overcome generations of segregation or inadequate education; nor have plaintiffs introduced them as stepping stones to more effective remedies.[12]

Processes of School Change

Even if social scientists can specify the conditions that are most likely to lead to enhanced educational and social outcomes for youth, a number of problems remain unsolved. How can local schools and school systems put these new practices into place? What is needed for schools to be able to try new ways of teaching and learning, organizing a staff, or creating new relationships between school and community people? In addition to specification of positive school and classroom procedures that might help make desegregation more effective, educational and social scientific research could help identify tactics by which these practices may be introduced and maintained. What are effective tactics of change in schools? What levers have to be pressed for educational officials throughout a system to undertake these and other changes in the quality and equality of educational services? What help and support do they need from the community? What pressure or threats could be brought to bear on them?

In this arena, compliance with the judge's order is only the tip of the iceberg. In a human service system such as the school, compliance with the letter of the law may not be as important as commitment to the spirit of the law. Wholesale commitment of educators to remedying racial injustice is what is really at stake. . . in court and in school. While some aspects of "commitment" may be intangible, a comprehensive plan with incentive systems and change techniques specified could be most useful. Such organizational plans might help marshall human resources to support and advance the agenda of effective school desegregation.

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[12] Although in Los Angeles, several of these mechanisms were included in the defendant's plan, and several judges in other recent cases have noted the importance of pluralistic curricula and positive teacher attitudes in these orders.

Various studies of the process of implementing educational innovations help us identify some of the critical organizational factors that may develop and sustain such commitment to change. For instance, Gross and his colleagues (1971), as well as other scholars, indicate that implementation will be more difficult under the following organizational conditions:[13]

When organizational members are unclear about change or what is expected of them to implement it
When leaders of implementing organizations lack managerial or political skill
When leaders of implementing organizations are not committed to change
When organizational members lack the skill to carry out the new program
When there is a lack of organizational motivators, including incentives and constraints
When work arrangements require people to act in ways that are incompatible with the changes
When there is not an effective communication system between managers and subordinates
When there is no monitoring or enforcement system that develops a normative press for implementation

This list describes the current state of affairs in many local schools and school systems. Although these organizational conditions may be endemic, they may not be very noticeable in the conduct of everyday school activities. However, under the pressure of desegregation orders, and in the midst of school and community stress and controversy, even minor problems and inadequacies take on much greater import.

Although most studies contributing to the above list focussed on the internal adoption of educational innovations, the principles are relevant to our concern with policies established by external authorities such as the judiciary. As we have noted previously, the meaning and implications of judicial orders sometimes are unclear, or are unclearly communicated throughout the school system. Moreover, leaders' lack of commitment and skill in mobilizing staff and material resources to implement change often stand in the way of effective desegregation efforts. Even when all people are straightforward and competent in their attempts to make school changes, the very nature of the educational bureaucracy may defy change. The lack of payoff for educators to teach or manage differently, the lack of teamwork in an autonomous professional system, and the lack of effective vertical and horizontal communication may make it quite difficult for any and all members of a school staff to find new ways of working together in times of stress and challenge. Without an effective monitoring system to provide either evaluative feedback or a continuous pressure for change, teachers may continue to conduct classrooms in their typically autonomous fashion, and principals may continue to operate their staffs and schools without external review and/or support.

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[13] In addition to the voluminous literature on organizational change in schools (e.g., Milstein (ed)., 1980; and Schmuck & Miles (Ed), 1971), see some of the recent studies of the implementation of public policy decisions (e.g., Sabatier & Mazmanian, 1979; van Horn & van Meter, 1977).

The failure to alter these organizational characteristics of schools, and other problems of implementing educational change, have created what many authors call "second generation" problems of school desegregation. Problems such as increased vandalism and truancy, increased inter-racial fighting and tension, increased minority suspension, lack of minority achievement, and teacher stress and burnout are not necessarily attendant upon desegregation; they appear to be endemic to urban school systems generally. Nevertheless, many of these "second generation" problems are brought about by the failure to create and implement an effective desegregation policy in the first place. If the original policies (judicial orders) had contained the program foci discussed on page 15-17 and 18, and if these programs had been successfully implemented, we might not now be struggling with such issues. Thus, second generation problems even more urgently call attention to better implementation of desegregation decisions and plans.

A variety of specific tactics have been used to bring about changes in complex educational systems. Some involve normal administrative procedures, but others involve special programs of planned change. In general, these extraordinary tactics or change designs can be organized into several groups seeking to alter: (1) the values and skills of organizational members; (2) the relationships among members of a school staff and community; (3) the nature of the organizational structure in which they operate, and; (4) the resource base supporting their work. A history of research on educational change and a substantial data base suggest actions that might a implementation of desegregation.[14]

Staff training programs
    focussing on innovative classroom techniques
    focussing on staff racism and the skills in working with students of different racial groups
    focussing on leadership skills and styles of administrators

Organizational development efforts
    focussing on developing a well-knit staff
    creating interracial teams of staff members
    increasing communication among a staff and between staff and students and community members

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[14] As with other lists, this one also is neither exclusive or exhaustive. Different tactics will work best in different systems, depending upon the structure and personnel of a system, its local history and experience, the resources currently available for a change effort, etc. Practical handbooks for creating change have been created by scholars who are committed to planning and carrying out desegregation-related improvements in schools (see some of the items referred to in Chapter 4).

- sharing decision-making power more broadly within a school staff
- generating vigorous leadership and support from senior officials
- reorganizing reward and incentive systems to provide "payoff" for staff members trying new options

Community organizing efforts

- bringing different community groups into a coalition or alliance to support school change
- aiding community groups to establish monitoring programs and to publicize and sanction non-compliance
- providing for school-community councils that advise school officials or that make local school decisions
- generating new material and social resources to support school policies and programs

These tactics address the barriers to change discussed on prior pages; they should encourage and support more innovative efforts in local schools. All these efforts speak to rearrangements of educational structures, especially those concerned with the utilization of human resources and personnel. Some suggest the need for personnel to be retrained and/or deployed in new and different ways. Others focus on reorganizing the power system of the school, so that access to decision-making, and to the information base on which decision-making rests, is shared more broadly throughout the school and community.

Some of the change tactics in the list above are consistent with a consensus approach to change, and can be utilized in a collaborative problem-solving mode of organizational adaptation and change. For instance, teacher training efforts that improve skills, organizational development efforts that improve communication and interpersonal sensitivity, and organizational or community efforts to provide new resources and more skillful leadership are all consistent with the consensus model explicated in Chapter 1.[15] Other tactics require surfacing repressed conflicts, and the mobilization of various groups to express their own needs. For instance, monitoring the school from outside, sanctioning non-compliance and developing new systems of power and control internal and external to the school, are all consistent with the conflict model of change. Neither model or set of tactics is necessarily or universally superior to the other. In most circumstances, different groups will use aspects of different models, and utilize any and all of the above tactics, in an overall effort to implement effective desegregation in the local school system.

The modification of human resources, social structures and power arrangements combine to alter the very fabric of schooling. At some point, they add up to new kinds of missions for schools, missions tuned to effective desegregation and higher quality education for all youth. Obviously, at least in the context of this report, such a renewed mission for schools requires ancillary adjustments in the mission and standard operating procedures of the social sciences and the courts as well. For instance, research studies leading to the above tactics or programs are relevant to the eventual resolution or amelioration of racially potent community controversies about the quality and equality of education. As such, they are relevant to a settlement of the broader disputes underlying specific school desegregation cases. Ignoring these findings in court proceedings leads to the creation of remedies which may not make much of a difference to school children, no matter how consistent the remedies may be with the letter of legal precedent and consitutional guarantee. Indeed, most cogent research in the past two decades of school desegregation show just that: not much of a difference.

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[15] Figure 1.1, in Chapter 1, explicated the relevance of the consensus and conflict models for alternative perspectives on the nature of school organizations, and the planning of change.

The traditional model of litigation and dispute settlement has stopped short of responding fully to these issues and to utilizing these data. When the legal dispute is settled, the courtroom actors -- scholars, attorneys and judges -- apparently see their job as done. The community dispute, however, may be far from settled. The structure of courtroom deliberations limits the kinds of scientific information used, and the kinds of implementation tactics prescribed. As we have shown in this report, these limits are by no means impermeable or permanent. Numerous judges are prepared to recognize the limits of traditional adversarial procedures, and traditional forms of dispute settlement: they seek new ways of generating integrative bargaining or relationship settlement procedures in and out of court.

However, the non-utilization of some forms of scientific knowledge is not solely a function of judicial approach and litigative structures. A fuller explanation must consider the nature of the scientific community -- scholars who have testified in court, and legal - scientific agreement on what evidence seems most important. Debates about the nature and causes of local demographics, and of intentional roots of school board actions, attract a group of scholars who may never have set foot inside a school building in their lives. . . at least not in their lives as scholars. Thus, they may not know much about the internal realities of schools and classrooms, and what works or doesn't work in these settings. They certainly may not know how to help change a school or school system. If the judiciary utilized an integrative mode of dispute settlement that sought to tie parties together to seek better schooling for all the youth in the community, it might conduct a more broad-ranging inquiry into the causes of educational inequality (only some of which lie in racial segregation, per se), and the means to remedy it (only some of which lie in racial desegregation, per se). Such an approach would require social science to move beyond some of its traditional limits as well.

If social scientific expertise is to be useful in the implementation of desegregation, it will have to focus on more than issues of segregation and desegregation, per se. The nature of the school organization, classroom interaction processes, and strategies and tactics of educational change are critical elements of a relevant social scientific knowledge in these situations. Some scholars have specialized in conducting research on those school and classroom conditions that promote positive gains for all children (on all or most of the criteria specified here). Their knowledge and expertise is useful, although seldom introduced into court, even at the point of remedy. Other scholars have specialized in ways of bringing about change in school structures and procedures. Their knowledge and expertise also is useful, and it, too, seldom is introduced into court, even at the remedy stage.

Moreover, social science will have to discover and utilize other applied roles and settings beside the courtroom if it is to be useful. In Chapter 4 we noted that many different kinds of applied social science are relevant in the school desegregation process: court testimony is only one of them. Courtroom testimony is inadequate if it is the sole vehicle for the effective communication and use of social science knowledge in these continuing controversies. Moreover, the mere conduct of research, and its dissemination through traditional academic channels, is an inadequate model for reaching school practitioners or concerned citizens. Although other roles for the use of applied social science could well be employed, there may be considerable resistance within the academic community to such efforts.

Thus, a concern for the implementation of effective desegregation programs requires a variety of changes in the ways the legal-judicial system and the social science system go about their traditional business. If the focus of these institutions' work, and of the actors representing these institutions, is to change the nature of racial inequality in the educational system, their own procedures, traditions and operative norms also will have to change.[16]

Many major changes in schools have occurred as a function of committed work by professional educators, and the pressure exerted by the minority community. Many changes have occurred as a result of court intervention, and applied social scientific efforts in and out of court over the past 25 years. Social scientists have entered into many new problem areas, and have utilized new methods and applied approaches as a result of their involvement in desegregation controversies. Despite these efforts, and recognizable changes, we have not yet implemented desegregation in very effective ways in very many schools. Future implementation efforts, of a higher quality, will require all three institutions - the legal system, social science and the educational system - to operate in new ways.

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[16] Indeed, that may not be their focus, and many would argue it should not be. Certainly, we do not think the cause of social and racial justice is dependent upon new forms of applied social science. However, if some segments of the social scientific community are committed to utilizing their expertise and expertness in this direction, the implications of a broader range of roles and activities are clear.

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APPENDIX[*]

INTERVIEW FORMAT FOR USE WITH SOCIAL AND EDUCATIONAL SCIENTISTS

INTERVIEW FORMAT FOR USE WITH ATTORNEYS

INTERVIEW FORMAT FOR USE WITH JUDGES

POST-INTERVIEW QUESTIONNAIRE LEFT WITH SOCIAL AND EDUCATIONAL SCIENTISTS

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[*] As we indicated in Chapter 5, these formats were used as guides to conversations with informants. All questions were not asked in precisely the same manner, or order, in all interviews.

INTERVIEWS WITH SOCIAL AND EDUCATIONAL SCIENTISTS

1. How did you happen to testify in the ___________ case? (Or, in these cases?)

2. What factors did you consider in deciding to testify?

   a. Did the decision generate any conflict for you ?

   b. Did you anticipate any tensions between your (usual) role as a social (educational) scientist and as an expert witness? (Or, between your role in the academy and the courtroom?)

      What was the nature of this tension?

   c. Did the decision seem consistent with other things you do as a social (educational) scientist . . . or was it something of a departure?

      Such as . . .

   d. Did the decision seem distinct from earlier decisions to do research on issues relevant to desegregation?

3. How did you prepare to give testimony?

   a. What type of legal briefing did you receive?

   b. Was there a consensus between you and the lawyers you were working with regarding the nature of your testimony? Were there any discrepancies?

   c. How did you decide on how you would present yourself . . . your style and dress and manner of presentation?

   d. Did you talk ahead of time with other social scientists who had testified in similar cases?

      Did you seek advice from anyone else?

4. What kinds of issues did you face while testifying?

   a. Did you ever wonder whether the judge understood what you were saying?

   b. Were you cross-examined? Was that stressful?

b.1. What major areas of your testimony did the opposing attorney challenge?

b.2. Was your integrity or credentials ever challenged?

b.3. Was opposing social science evidence ever presented in rebuttal to your testimony?

How did you evaluate that evidence?

5. When testifying, did you in fact experience tension between your roles as a scholar and as a witness?

Was this anything like what you anticipated ahead of time?

a. Did you experience any conflicts in loyalty between your commitments to the professional standards and commitments to the clients in the case?

b. Some people have argued that expert testimony can be most effective when presented as part of a consultant panel to a judge, personally, rather than as open testimony in a courtroom. That would do away with the opportunity for cross-examination, etc. What would you think of this approach?

c. If you had been asked to testify for the opposing party in the case, would you have?

Under what circumstances? (Could your data have been used in other ways)?

d. Have you ever been asked to present data that were inconsistent with your own values and beliefs?

What did (would) you do?

6. We've been talking about the conflicts associated with the role of expert witness, what about some of the positives? What did you enjoy about testifying? Why do you do it?

a. Do you get paid to testify? If so, how much?

7. What legal issues did you address?

a. Were they primarily matters of merit or of remedy?

b. What kinds of things did you actually say?

c. Did you ever say anything you weren't absolutely sure of?

c.1. Did you ever testify to anything you would be uncomfortable arguing in front of a group of academic colleagues?

d. Have you ever seen (or heard directly of) other scientists who have presented testimony in court they couldn't back up scientifically?

What do you think of that? Is that OK? Really bad?

8. Do you have any sense or impression of the role your testimony played in shaping the judge's ruling?

9. What do you see as the appropriate roles of social science (education) in responding to social problems in general?

   What mix of scholarship and application, of research and action, seems most useful and appropriate?

   a. Are there some other social problem areas, besides desegregation, where you have played an active role? Such as . . . .

   b. Have you played an active role other than as an expert witness?

      Where and when?

10. How have you managed to integrate your role as an expert witness in this case (these cases) with your role as a scholar?

    a. Did testifying alter your concept of your scholarly role?

       a.1. Or of your role as witness.

    b. Are the roles of scholar or expert witness very different from that of an informed citizen?

    c. Have you had disagreements with, or ciriticism from, other social scientists about the propriety or wisdom of testifying?

    d. Have there been any professional consequences of testifying, either positive or negative?

    e. Do you think there are any problems raised for the discipline as a whole by the numbers of social scientists who are testifying in these cases?

       e.1. For instance, does it negatively or positively affectthe credibility or autonomy of the social sciences?

11. What is your evaluation of court-ordered desegregation as a national policy?

12. There certainly are plenty of controversies in the social sciences. What do you think accounts for the special heat generated by these issues related to desegregation . . . minority achievement, existence of racism, white flight, etc.?

13. What seems to be some of the major unanswered research questions relevant to school desegregation?

    a. In what areas of desegregation policy-making can social scientists (educators) be most helpful?

       Where can we not be helpful?

INTERVIEWS WITH ATTORNEYS

1. How (andor Why) did you get involved in the ____________ case? (Or, in these cases?)

    a. Have you been involved in other school desegregation cases?

    b. Who was your client, exactly?

2. What was your legal theory or strategy in the case?

    a. What legal issues were at stake?

    b. What evidentiary issues?
    What did you have to show?
    How did you plan to show it?

3. Did you use any social scientific evidence or witnesses on your side of the case?

    IF YES:
    a. What were you trying to show with them?
    b. Who were they?
    c. How did you get hold of them?
    Where did you hear about them?
    d. What kinds of information did they present?

    IF NO:
    a. What about the opposition, who did they bring in?
    b. What were their names?
    c. What were they trying to show?

4. Did you prepare your witnesses in any way ahead of time (if used)?

    a. Did you meet with them ahead of time?
    b. What did you tell them about the case?
    c. About the courtroom process?
    About cross-examination?

5. Did you prepare yourself in any way for the opposition's witnesses?

    a. What were they like?
    Fair and impartial? Advocates?
    b. What did you try to do in cross-examination?
    How did it go?

6. What makes a witness good or effective in court, in general?

   a. Who was a good witness, for example?
      Why was she/he good?
   b. Who was not so good?
      Why?

7. Do you think the social scientific evidence had any impact on the judge and on his decision?

   a. Which witnesses made the most sense to him, do you think?
   b. Was he pretty open, or had he already made up his mind?
   c. Did you plan ahead of time how to influence him?
      On what basis?

8. In some cases, a number of people have begun talking about an alternate procedure for using expert witnesses, a panel of experts appointed by the judge and accountable to him. Have you heard about this?

   IF NO: explain a bit more about the Los Angeles example.

   a. What do you think of such a procedure?

9. What is the legal status of the ___________ case now?

10. What do you think the future of these cases is going to be?

   a. How do you deal with Incremental Segregative Effect issues?
   b. What are some reasonable remedies, as you see it?
      Metro?
      Do cases ever end?

11. What do you think of school desegregation, and how its working across the country?

   a. How about in this community?
   b. What about the quality of education in general?

INTERVIEWS WITH JUDGES

1. What were the important legal issues in the ____________case?

   a. How did any of the social scientific evidence touch on these issues?

2. Do you remember who the expert witnesses were?

   a. What kinds of evidence did they offer?
   b. Did they have any impact on you and your decision?
   c. What did you think of their testimony?

3. What makes an expert witness credible as far as you are concerned?

   a. Who were some especially credible witnesses?
   b. Who wasn't?

4. Are there ways in which social science evidence is any different from other kinds of evidence?

   a. What about when there is conflicting social scientific evidence?
      How can you resolve it?
   b. Were there other witnesses, not necessarily social scientists, who were impressive in this case?
   c. Are there any suggestions you have for procedures which might make it easier to use scientific information?

5. In some cases, people are talking about using a scientific panel, a court-appointed body of experts that would report directly to the judge. Have you heard of or used such a panel in any cases?

   a. What do you think of it?
      Does it have any advantages over the party-witness procedure?
      Any disadvantages?

6. How did you decide your findings in the case?

   a. What helped make up your mind?
   b. How did you construct a remedy?
   c. Did you use any social science evidence?
   d. Did you set up a monitoring procedure?
      Do you think the community and school people will cooperate pretty well, or not?

7. Sometimes it appears that these cases never end, what with appeals, changing conditions, and so on. What do you think will happen in this case?

   a. What are the implications of some other recent Supreme Court findings for the future of school desegregation? (name recent cases, such as Dayton & Columbus).

8. How have people in the community reacted to you, as a result of this case?

   a. Do you think judges in other cases have been put into some tight binds as a result of their roles and decision-?

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Questionnaire for Social Scientists Testifying in School Desegregation Cases

1. Please list the cases in which you have testified, and check the column(s) which describes the nature of your testimony in each case. (If you have testified in more than 5 cases, list just 5 illustrative ones and give the total number of appearances.)

Case	Appearance in Courtroom	Deposition	Affadavit
1.			
2.			
3.			
4.			
5.			

2. Do you expect to continue to testify in desegregation cases? If not, why not?

3. Have you served in other roles in the area of desegregation that utilized or applied social science knowledge (e.g., master or monitor, consultant to a party or agency)? What kinds of things did you do? (If your involvement was linked to a specific case/city, please specify.)

4. Is there any written work available describing or reflecting on your role(s) in these cases? If yes, please attach a copy or include a reference.

5. Are there desegregation cases in which you were asked to participate in some way (testify, consult, monitor) and you declined? If yes, what influenced your decision?

6. Do you know of any other social scientists who were asked to testify and declined? Who? Do you know why he/she declined?

7. Different scientists have presented different kinds of "evidence" in court. Would you please check the following chart to indicate the types of evidence you have presented . . . ever?

Please check
if presented

A. Data you collected . . . .

Data collected by another social scientist . . . .
(If checked, who collected it?)

Data collected by a local school system . . . .

Data collected in the geographic area covered in litigation . . . .

Data collected specifically for court presentation . . . . .

B. Survey data . . . .

Experimental data . . . .

Ethnographic data . . . .

Case study data . . . .

C. Conclusions about the meaning of data you collected . . . .

Conclusions about the meaning of data collected by others . . . .

Conclusions based upon your experience in other school systems and cities . . . .

D. Conclusions or speculations not specifically tied to a data set . . . .

8. Has anyone ever presented data you collected as part of their testimony? If yes, how did you feel about the uses made of it?

9. Please specify the names of your 3 closest professional colleagues and check any columns which describe the work they do.

Name	In the Area of Deseg.	Policy Relevant Work	Have Influenced Your Decision To Testify
1.			
2.			
3.			

10. Do you consider yourself a "social scientist" or is there another term you feel fits better? (What other term?)

Thank you.